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THE

CALCUTTA LAW REPORTS

OF

CASES

DECIDED BY THE

HIGH COURT, CALCUTTA,

ALSO

JUDGMENTS OF H. M.'S PRIVY COUNCIL.

EDITED BY

P. O'KINEALY,

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,, ,, LOUIS STEUART JACKSON, C.I.E.,		*Judges.*
,, ,, CHARLES PONTIFEX,		
,, ,, WILLIAM AINSLIE,		
,, ,, ERNEST GEORGE BIRCH,		
,, ,, GEORGE GORDON MORRIS,		
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,, ,, WILLIAM FRASER McDONELL, V.C.,		
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,, ,, LOFTUS RICHARD TOTTENHAM,		*Officiating as Judges.*
,, ,, ALEXANDER THOMAS MACLEAN,		
,, ,, LEWIS PRICE DELVES BROUGHTON,		

The Hon. SIR RICHARD GARTH, *Knight*, Chief Justice, was absent on leave from 17th August to 17th September, 1878.

The Hon. LOUIS STEUART JACKSON, C.I.E., officiated as Chief Justice from the 19th of August, 1878 to the 17th September, 1878.

The Hon. ERNEST GEORGE BIRCH was absent on leave from the 16th of February, 1878 to the 24th December, 1878.

The Hon. GEORGE GORDON MORRIS was absent on leave from the 8th of April, 1878 to the 12th October, 1878.

The Hon. HENRY STEWART CUNNINGHAM was absent on deputation from the 11th of May, 1878.

The Hon. LOFTUS RICHARD TOTTENHAM officiated as a Judge from the 8th of April, 1878 to the 24th December, 1878.

The Hon. ALEXANDER THOMAS MACLEAN officiated as a Judge from the 17th of April, 1878 to the 12th October, 1878.

The Hon. LEWIS PRICE DELVES BROUGHTON officiated as a Judge from the 11th of May, 1878.

The Hon. GREGORY CHARLES PAUL, C.I.E.,... *Advocate-General.*

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CALCUTTA

HIGH COURT REPORTS,

ORIGINAL, APPELLATE, AND REVISIONAL.

[CIVIL APPELLATE JURISDICTION.]

LANGLOIS . . . . . PLAINTIFF;

AND

RATTRAY AND OTHERS . . . . . DEFENDANTS.

1878
June 16th.

*Fraud—Estoppel—Owner of land standing by—*Bonâ fide *possessor—Expenditure on faith of good title.*

In order to prevent the owner of land,—who is charged with standing by and allowing another person, who believes he has a good title thereto, to enter on the land and spend money in improving it,—from recovering possession thereof, fraud and deceit on the part of the owner must be clearly proved.

Dann vs. *Spurrier*, 7 Vesey, 251; and *Ranee Rama* vs. *Jan Mahomed*, 11 W. R., 574, explained.

APPEAL under section 15 of the Letters Patent from a decree passed by Mr. Justice KEMP, affirming that of the Judge of Chittagong, which reversed a decree of the Moonsiff of that district accruing the plaintiff's claim. The judgment appealed from was as follows :—

The plaintiff is the special appellant in this case. He sues for *khas* possession of a small area of land comprised in a Nowabad estate, in Zillah Chittagong. This holding is registered in the names of Amanoollah and Amanoollah, and consists of 14 dags as recorded in the Government chitta. Plaintiff comes into Court basing his title to *khas* possession on a deed of conveyance executed by Sachea Beebee, the daughter of Amanoollah,

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LANGLOIS v. RATTRAY.

Statement.

one of the registered proprietors of the Nowabad mehal. This conveyance is dated the 18th of January 1877, and the present suit was brought very shortly after the execution of that deed, namely, on the 3rd of February 1877, suing for *khas* possession. The land in suit is valued at Rs. 2-3-0. Three defendants were made parties to the suit; the principal defendant, Mr. Rattray defendant No. 1, Mr. W. Sasson defendant No. 2, and the plaintiff's vendor, Sachea Beebee, defendant No. 3. The defendant No. 2, Mr. Sasson, repudiates all connection with the case, and claims to be absolved. Mr. Rattray, the principal defendant in the case, alleges that he was put in possession of the disputed lands by Futteh Ali, who purchased them from Amanoollah, the father of the plaintiff's vendor, that he remained in possession since his purchase, and planted the land, which was waste land, with tea plant, and that the crop on the ground is a very valuable one; and on this part of the case the Judge has found that the tea plant is worth Rs. 2,000 at least. Mr. Rattray further states that no opposition was made by the plaintiff's vendor to his taking possession of these lands, and that the allegations of *khas* possession and of having sold her title in the land to the plaintiff is false; and that he, the principal defendant Rattray, had become possessed of these lands *bonâ fide* under the tenancy created by Futteh Ali who had purchased from Amanoollah.

The First Court gave the plaintiff a decree for *khas* possession. The Moonsiff was of opinion that the suit was not barred by the Statute of Limitations, inasmuch as a period of twelve years had not elapsed from the date, namely, the 12th of Aughran 1235 Maghee, when Futteh Ali is said to have purchased the lands from Amanoollah. Then he finds that the lands were in possession of the defendant Sachea Beebee up to Assin 1238 Maghee—that would be about September 1876; that she paid rent to Government for the lands and held possession of them up to the date when she sold her right and interest to the plaintiffs. With reference to the defence of the defendant No. 1, in the matter of the purchase by Futteh Ali from Amanoollah, the First Court found that the allegation of purchase by Futteh Ali from Amanoollah had not been proved. He, therefore, decreed the plaintiff's suit, the plaintiff to get *khas* possession of the lands in suit.

On appeal, the Judge has reversed that decision. He observes the defendant No. 1, Mr Rattray, took possession on the 1st of Kartic 1238 (that would be September or October 1876), of the land in dispute, which was then waste, for the purpose of making a tea nursery; that he took the land *bonâ fide* from Futteh Ali; and that no objection was made to Mr. Rattray's entrance; that three months after Mr. Rattray had taken possession and after he had planted out tea plant on the lands in dispute, the plaintiff, knowing that a tea nursery had been started, got Sachea Beebee, his vendor, to sell to him this plot of land, and now comes into Court suing for *khas* possession. The Judge observes that, although the suit is only valued at Rs. 2-3-0, the lower Court ought to have perceived that the real object is to

obtain the tea nursery, the plants in which must be worth at least Rs. 2,000; and that the lower Court in decreeing *khas* possession has virtually given to the plaintiff possession of the garden with the tea plant. Then the Judge says that the remarks of the lower Court with reference to the genuineness or otherwise of the deed of sale from Amanoollah to Futtéh Ali, in the absence of Futteh Ali—the lower Court having declined to allow him to be made a co-defendant—were *ultra vires;* and that the question of title between Futteh Ali and Sachea Beebee could not be decided in the absence of Futteh Ali. Then he observes upon the suspicious character of the sale to the plaintiff by Sachea Beebee, and says that she, if she had any title to the land, stood by and allowed Mr. Rattray to take possession of this land, to spend money in planting out the land as a tea garden, and that now she is trying, in collusion with the plaintiff, to deprive the defendant, Mr. Rattray, of all the benefit of the capital which he has laid out on the garden by applying for *khas* possession of the land; that the defendant evidently took the land in good faith; and that therefore he ought to be protected from summary ejectment; and that the only claim which the plaintiff may possibly have against him, would be a claim for rent. He, therefore, reversed the decision of the first Court and dismissed the plaintiff's suit.

The grounds taken in special appeal are, that the lower Appellate Court was wrong in disallowing the plaintiff's claim for recovery of *khas* possession, and that on the case made by the plaintiff the lower Court ought to have decreed *khas* possession, and not to have referred the plaintiff to a suit for assessment of rent. Now, on referring to the deed of sale upon which the plaintiff bases his case, I find that Sachea Beebee, on the 6th of Magh 1238 Maghee, corresponding with the 18th of January 1877, purports to sell the property in dispute to the plaintiff for a consideration of Rs. 100. There is a clause in the deed of conveyance to which my attention has been drawn, the effect of which is as follows:—The vendor recites that the land was in her father's and in her own *khas* possession; and that if it be found that she has made a conveyance of this property to any other party, or if it should appear that she has made any *bundobust* with any other party whereby the *khas dukhul* or direct possession, which is the object of the plaintiff in this case, is frustrated, she will not only return the purchase-money, but also pay a penalty of Rs. 100 to her vendee, the plaintiff. Therefore, it appears to me very clear, that the object of the plaintiff in making the purchase was to eject the defendant from this land, upon which he had spent money in making a tea garden.

The defendant, in his written statement, alleges that this suit has been brought by the plaintiff, with whom he is at enmity, for the purpose of obtaining possession, not only of this portion of land, but also of the valuable crop which is on the land. Looking at all the circumstances of the case I am clearly of opinion that this allegation is a true one. Then it is

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Judgment.

also very clear from the finding of the Judge that the plaintiff's vendor, Sachea Beebee, stood by and allowed the defendant No. 1, Mr. Rattray, to enter into possession of this land and to spend his capital in preparing a tea garden upon it. I am, therefore, of opinion that the principle laid down in the decision to be found in 11 W. R., 574, applies to this case, and that the Judge was right in holding that the plaintiff was not entitled to *khas* possession. I, therefore, see no reason to disturb the finding of the Judge, which I find to be a right and equitable finding: and I dismiss the special appeal with costs.

Plaintiff appealed under section 15 of the Letters Patent.

Baboo *Aukhil Chunder Sen*, for Appellant.

Baboo *Mohini Mohun Roy*, and Baboo *Kishore Mohun Roy*, for Respondent.

The judgment of the Court (1) was delivered by

GARTH, *C.J.*

GARTH, *C.J.*:—

This was a suit to obtain *khas* possession of certain land, which the plaintiff had purchased from the defendant No. 3, Mussamut Sachea Beebee. Some three or four months previously to this purchase, the defendant No. 1, Mr. Rattray, took possession of the land in dispute, which was then waste, and made a tea nursery there. He did this by permission of one Futteh Ali, who claimed to be the owner of the property; and it appears that Futteh Ali had verbally agreed to give him a lease of the land as soon as the tea nursery was properly planted. Futteh Ali claims to have bought the property from Amanoollah, the father of the defendant No. 3, on or about the 12th of Aughran 1235; so that both parties claim originally under the same title, Mr. Rattray claiming under Futteh Ali, who says he bought the property from the father of the defendant No. 3; and the plaintiff claiming directly from the defendant No. 3, under a deed dated in January 1877. The suit was brought in February 1877; and as Futteh Ali's alleged deed of purchase was executed within twelve years from the time when the suit was brought, it is clear there is no ground for the plea of limitation; and that plea was not in fact argued before us.

(1) GARTH, *C.J.*, and MCDONELL, *J.*

The Moonsiff went into the question of title, and found in favour of the plaintiff, upon the ground that the deed under which Futteh Ali claimed was not genuine.

The District Judge, without going into that question at all, decided in favour of the defendant, on the ground that, as Mr. Rattray had taken possession of the land, and had gone to considerable expense in making it into a tea plantation, he could not, upon principles of equity, be ejected; and that all the plaintiff could do, even assuming he was the true owner of the property, was to sue Mr. Rattray for rent.

The learned Judge of this Court has affirmed this decision. He considered that the lower Appellate Court must have found that the plaintiff's vendor, the defendant No. 3, was aware of Mr. Rattray's entering upon the land, and of the expense which he had incurred in planting it, &c.; and therefore upon the principle of the case of *Ranee Rama and another* vs. *Jan Mahomed,* 11 W. R., 574, which he considered to be applicable to the present, he dismissed the special appeal.

We are unable to agree with the learned Judge in this view. The wholesome rule of equity, which was laid down in *Dann* vs. *Spurrier,* 7 Vesey, 231, and upon which the judgment in 11 W. R., 574, proceeded, is stated by Lord ELDON thus:—

"When a man builds a house on land, supposing it to be his own, and believing that he has a good title, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not allow the real owner to assert his legal right against the other, without at least making him full compensation for the money he has expended."

But, assuming this rule to have been properly acted upon in the case reported in 11 W. R., 574, we think we should be stretching it to a most alarming and unreasonable length, by applying it to a case like the present.

In the first place, there does not appear to be any evidence that the plaintiff's vendor, who is a *purda nasheen* lady, was at all aware that the defendant, Mr. Rattray, was planting the land, or that Futteh Ali had given him permission to do so. Then as regards the plaintiff himself, he certainly did not purchase the

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GARTH, C.J.

property till January 1877, when the planting was finished, and within three or four weeks afterwards he brought this suit; so that there was neither delay nor deception on his part. It is very possible that the plaintiff may have supposed that Mr. Rattray was relying upon an invalid title; and, indeed, there seems little doubt that Mr. Rattray did a very imprudent thing in planting the land and expending his money upon the strength of a title which he does not appear to have investigated, and upon the faith of a mere verbal promise of a lease from Futteh Ali; but there is no reason why the plaintiff should not have availed himself of his means of knowledge to make a good bargain for himself, so long as he did nothing to deceive or mislead Mr. Rattray.

The circumstances of the case are widely different, both from those described by Lord ELDON, and from those in the case cited in 11 W. R., 574. In the latter case, the plaintiff, who claimed the land in dispute, had allowed the defendant, who believed he had a good title to it, to build a house and lay out a large sum of money in gardens and ornamental works, whilst he, the plaintiff, stood by for a period of eleven years, and thus induced the defendant by his silence, and by not disclosing his adverse claim, to make the outlay.

It is the *deceit* and *fraud* of the rightful owner, in these cases, which is the foundation of the rule of equity, and such fraud and deceit must be very clearly proved. (See *Dann* vs. *Spurrier* 7 Vesey, 231, and other authorities cited in 2 White and Tudor's Lead. Cases, 922, 2nd edition.) But here there was no such deceit. The plaintiff brought his suit immediately upon his purchasing the property; and, however imprudent Mr. Rattray may have been, he had plenty of time to ascertain whether he had made a mistake, and, if he had, to rectify it. Mr. Rattray had paid nothing for the lands, and there was no reason whatever, as far as we can see, why he should not, whilst this suit was pending, have taken up his tea plants at the proper time of the year, (which is said to be about September or October,) and have disposed of them elsewhere. He had ample opportunity for doing so last year; and he may probably have another before this suit is terminated; but if, instead of adopting that

course, he prefers to take his chance, and to insist upon defending the suit upon the strength of Futteh Ali's title, he must abide by the consequences, if he should turn out to be wrong.

If the rule of equity, upon which the learned Judge has acted, is to be applied to a case of this nature, it would also be applicable in all cases where a person who claims agricultural land, allows a party wrongfully in possession to sow the land with paddy or other grain, before he brings his suit to recover it. It might equally be said in such a case, that the claimant ought to have brought his suit before the paddy was sown; and as he did not do so, he ought not to be allowed to recover possession, (though he proves a good title), until after the defendant's crop had been reaped.

It has been suggested to us that Futteh Ali ought to be made a party to the suit, inasmuch as his title is called in question, and he is therefore interested in the result of the case. But the decree, when made, will not be binding on Futteh Ali, and we find from the Moonsiff's judgment that Futteh Ali, although not made a defendant, has been examined at the trial; and the question of title was apparently tried as fairly and fully before the Moonsiff, as if he had been made a party. Moreover, we do not find, that in appealing from the Moonsiff's decision, Mr. Rattray alleged, as one of his grounds, that Futteh Ali had not been made a party. In the exercise of our discretion, therefore, we think that there is no sufficient reason for placing Futteh Ali's name upon the record, and that the question of title may, so far as we can see, be satisfactorily disposed of upon the evidence already taken.

The judgment, therefore, of both Appellate Courts will be reversed, and the case will be remanded to the lower Appellate Court, to try the question of title. If the Judge should find that he cannot satisfactorily try that issue without further materials, he will be at liberty to allow both parties to adduce additional evidence upon that head. The costs in this and the other Appellate Courts will abide the result of the suit.

[CIVIL APPELLATE JURISDICTION.]

1878
May 3rd.

SHAH GANEEMUT HOSSEIN AND ANOTHER . PLAINTIFFS;

AND

RUNGOO SAHOO . . . . . DEFENDANT.

Jurisdiction—Suits for Rent of Houses—Small Cause Court—Act VIII (B.C.) of 1869—Rent of Houses.

The rulings applicable to suits for rent of houses, or of portions of land covered with houses or markets, have no reference to suits in which rent is claimed in respect of a mouzah or of an entire estate, or the aliquot part of an estate. Hence, a suit for rent of 8 annas of a mouzah which was part of the plaintiff's zemindary, held in farm as a whole by the defendant, may be properly brought in a Civil Court under the provisions of Act VIII (B.C.) of 1869.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Burdwan reversing that of the Moonsiff of Monghyr.

Plaintiff leased to the defendant, for a term of five years, from 1277 to 1281, both inclusive, the entire zemindary rights in 8 annas of Mouzah Khagaryagunj, at an annual rent of Rs. 127. The defendant executed a kabulyat in favor of the plaintiff which was duly registered. The property leased is in fact a bazaar where there are no cultivated lands, and the income derived from it consists of house rent, "tahbazari," &c. The Moonsiff decreed the claim of the plaintiff, who had sued on the kabulyat for the rent of 1281, but the Subordinate Judge reversed that decision, holding that the suit should have been brought in the Court of Small Causes, where only it was cognizable, and not in a Civil Court under the provisions of Act VIII (B.C.) of 1869.

Plaintiff appealed specially to the High Court, on the ground that the defendant having executed a kabulyat in favour of the plaintiff, a suit upon that kabulyat was properly brought in the Civil Court under Act VIII of 1869.

Moonshee *Mahomed Yusoof*, for Appellant.

Baboo *Bussunt Coomar Bose*, for Respondent.

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SHAH GANEE-MUT HOSSEIN v. RUNGOO SAHOO.

Judgment.

JACKSON, *J.*

The judgment of the High Court (1) was delivered by

JACKSON, *J.*:—

It appears to me that the lower Appellate Court is mistaken in this matter. The rulings applicable to suits for rent of houses or of portions of land covered with houses or markets, have no reference to suits in which rent is claimed in respect of a mouzah, or an entire estate or the aliquot part of an estate. Here the suit was for rent of 8 annas out of 16 annas of Mouzah Khagaryaguaj, appertaining to Talook Bilas, which was the zemindary of the plaintiffs, and was held in farm, as a whole, by the defendant. I think that such a suit was properly brought in the Civil Court under the terms of Act VIII (B.C.) of 1869, and the lower Appellate Court, therefore, ought to have simply considered whether rent was due from the defendant or no. The case will be accordingly remanded. The costs will follow the result.

(1) JACKSON and TOTTENHAM, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

May 9th.

DOKHINA KALLY DEBEE . . . . . PLAINTIFF;

AND

DINA NATH ROY CHOWDHRY AND ANOTHER DEFENDANTS.

Benamee—Estoppel—Bond for repayment of money lent—Purchaser bonâ fide *without notice.*

Where, in a bond given by A to secure the repayment of money lent by B to A, it is stated that the money was lent by C, it is no answer to a suit on the bond, brought against A by a person who has purchased the bond from C, *bonâ fide* without notice, that the money advanced belonged to A.

A person who lends money in the name of another must accept the consequences, if an innocent purchaser deals with the person whose name appears upon the document as the party really entitled to the receipt of the money.

SPECIAL APPEAL from a decree passed by the Judge of the Pergunnahs, affirming that of the Second Subordinate Judge of that district.

The facts of the case are as follows:—The father of Unnoda Nath Roy Chowdhry died when the latter was only 3 months old,

[illegible] leaving his widow Kaminee Debee and his infant son surviving. The mother and son lived together till the death of the latter in Kartic 1270 at the age of [illegible]. On the 1st of Assar 1270, Dina Nath Roy Chowdhry executed a mortgage bond in favor of Kaminee Debee to secure the sum of Rs. [illegible] and interest. On the 6th of Sraban 1281, Kaminee, as the plaint alleged, assigned this bond to Dokhina Kally Debee, who instituted the present suit to enforce the security.

The defence was that the money was borrowed from Unnoda Prosad Roy Chowdhry and not from his mother Kaminee Debee; that the bond was taken by Unnoda benamee in the name of Kaminee; and that as Unnoda had died childless leaving a widow, Unnoda Kaminee Debee, surviving, the land belonged to the latter as heiress of Unnoda. The defendant also alleged that the assignment was made with notice of all these facts, and therefore fraudulent.

The Court of First Instance dismissed the suit. On appeal the Judge found that the money was borrowed from Unnoda, and that the transaction was a benamee one. He also found that the sale of the bond by Kaminee to the plaintiff was not proven, and affirmed the judgment of the lower Court. The plaintiff then specially appealed to the High Court.

Baboo Kally Mohun Dass and *Baboo Bhoobun Mohun Dass*, for Appellant.

Baboo Chunder Madhub Ghose, and *Baboo Bhowany Churn Dutt*, for Respondent.

The judgment of the Court (1) was delivered by

MARKBY, J. MARKBY, J.:—

In this suit, the plaintiff sued upon a mortgage bond for Rs. 2,000, executed by defendant No. 1 in favour of Kaminee Debee, defendant No. 2, and transferred to the plaintiff by Kaminee by a registered bill of sale. The plaintiff was in possession of the bond. The substantial defendant answered that the mortgage deed was really executed in favour of one Unnoda Prosad Chowdhry, the son of Kaminee, "in the *benamee* name of

(1) MARKBY, J.

his mother;" and that Kaminee had no interest in the bond; that Unnoda Prosad died childless leaving his widow Umbica Kalee his heiress; that a portion of the debt was paid to her, and an arrangement made for paying off the remainder by instalments; under which arrangement Umbica Kalee had obtained a decree. The defendant further alleged that Ram Kalee Roy Chowdhry, now represented by plaintiff, his widow, had got Kaminee, the defendant No. 2, to execute the transfer of the mortgage to his wife, but that there was in fact no real transfer.

The issues were as follows: (1.) Whether or not Kaminee Debee was beneficially interested in the money covered by the bond? (2.) Whether or not plaintiff's purchase is *bonâ fide?* (3.) Has defendant realized a portion of his debt as alleged? Both Courts dismissed the suit, and plaintiff appeals.

The first Court found that the money belonged to Unnoda and not to Kaminee; and that the plaintiff was not a *bonâ fide* purchaser for value. The District Judge on appeal agreed that the money advanced belonged to Unnoda, and it is upon the exact nature of the rest of his finding that the present appeal turns.

It us argued before us that, quite independently of the rest of this finding, the fact found by both Courts that the money advanced was the money of Unnoda and not of Kaminee, in whose favour the bond was executed was sufficient to dispose of the case in favour of the defendant. But to this I am not prepared to agree. If A executes a bond in favour of B, and B transfers that bond to C, I should say that, under ordinary circumstances, it was no defence in a suit by C against A to say that the money was advanced by D and not by B. It seems to me that the security, which it is sought to attain by reducing transactions into writing, would be in a great measure lost if such a defence could be set up. Contracts for the payment of money are by the law of this country transferable, and I think a person who lends money in another person's name must accept the consequences, when innocent purchaser deals with the person whose name appears on the document as the party really entitled to the receipt of the money.

I do not feel sure that the observations of Mr. Justice PAUL in [illegible] L. R., 720, A. C, or of Mr. Justice MITTER in 23 W. R., 446,

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DOKHINA KALLY DEBEE v. DINA NATH ROY CHOWDHRY.

Judgment.

MARKBY J.

which were relied on for the respondent in this case, are opposed to this view. The circumstances of those cases are not fully stated: if they were so, it might turn out that they were different from the case I am now considering.

There are, no doubt, circumstances which would enable the defendant to set up this plea; that is to say, there may be cases in which the transferee of the debt, though he may have as between himself and his tranferor a perfectly valid transfer of the debt, nevertheless cannot sue the debtor for it. This would clearly be the case if the transfer were itself a fraud.

Upon a careful consideration of the judgment of the District Judge, I think he has found in the present case that the plaintiff is only a nominal party, and that she has no interest in the debt at all; that such transaction, as there was, was between Ram Kalee, the husband of the plaintiff, and Kaminee; that the account of the transaction given on behalf of the plaintiff is untrue; that only Rs. 102 was paid to Kaminee, and not Rs. 1,500 as the plaintiff attempted to prove; and that the arrangement was made between Kaminee and Ram Kalee Roy, with the plaintiff's cognizance, in order to bring a suit to recover money which the parties knew they were none of them entitled to receive, and in case of failure to avoid incurring any substantial liability for costs.

Upon this view, I think the District Judge was entitled to dismiss the suit on the ground that the plaintiff was attempting to make the Court the instrument of a fraud. I am quite satisfied that there are no merits in the plaintiff's claim, and I am very glad to find that it is not necessary to remand the case. The special appeal is dismissed with costs.

[CIVIL REFERENCE.]

IN THE MATTER OF ACT XVIII OF 1869.

1878
June 16th.

Vakalutnamah—Power to receive Documents—Power-of-Attorney—General and Special power—Court Fees' Act—Act XVIII of 1869, *sch.* 2.

If a pleader is authorized by the *vakalutnamah* under which he acts to receive moneys or documents for his client in the course of the cause which he is empowered to conduct, or as a consequence of the decree or any order of the Court in such cause, a Court of Justice might legally and with propriety direct a public officer to pay money or make over valuable documents to the pleader, provided that such money or documents have become receivable by the client in the ordinary course of the suit, or in consequence of the order or decree.

A general or special power-of-attorney to enable the pleader to receive such money or documents is not necessary.

REFERENCE under section 41, Act XVIII of 1869, from the Secretary of the Board of Revenue, North-West Provinces, as to "whether a Court of Justice would ordinarily be acting regularly in directing a public officer to pay money or make over valuable documents to a pleader who has been empowered to conduct a case by a *vakalutnamah*, stamped under article 10, schedule 2 of the Court Fees' Act, but who has not been authorized by a power-of-attorney bearing the stamp prescribed in schedule II, Act XVIII of 1869, to receive on behalf of his client such money or valuable documents." The Board of Revenue intimated that in their opinion, "without a special or general power-of-attorney, bearing the stamp specified in schedule 2, Act XVIII of 1869, a pleader's authority under a *vakalutnamah* does not extend beyond the *conduct* of it, that is, the appearing, pleading and acting in the case for which the *vakalutnamah* was presented."

The judgment of the High Court (1) on the reference submitted is as follows:—

Upon the question addressed to this Court by the Board of

(1) GARTH, *C.J.*, JACKSON and AINSLIE, *J.J.*

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In re ACT XVIII OF 1869.

Judgment.

Revenue of the North-West Provinces, on the 29th of March last, we are of opinion that if a pleader is authorized by the *vakalutnamah* under which he acts, to receive moneys or documents for his client, in the course of the cause which he is empowered to conduct, or as a consequence of the decree, or any order of the Court in such cause, a Court of Justice might legally and with propriety direct a public officer to pay money or make over valuable documents to the pleader, provided that such money or documents had become receivable by the client in the ordinary course of the suit, or in consequence of the order or decree.

The receipt of money or documents under such circumstances is one of those ordinary duties which pleaders are continually called upon to perform for their clients, and a *vakalutnamah* properly framed, generally contains a power to perform such duties. If, therefore, the Legislature had intended, that in every such case a general or special power-of-attorney should be necessary to enable the pleader to receive the money or documents, it may be assumed that they would have said so in express terms.

[CIVIL REFERENCE.]

MAHARANEE SURNOMOYE . . . . . PLAINTIFF; 1878 June 27th.

AND

POOLIN BEHARY MUNDUL . . . . . DEFENDANT.

Plaint—Subscription of Plaint—Authorized Agent—Act X of 1877, section 51—Code of Civil Procedure.

Under section 51 of the Code of Civil Procedure, Act X of 1877, the Court may in its discretion admit a plaint which has been subscribed by an authorized agent of the plaintiff.

REFERENCE under section 617 of the Code of Civil Procedure, Act X of 1877, from the Judge of the Small Cause Court at Berhampore. The case is stated as follows:—

The Maharanee Surnomoye, of Cossim Bazaar, sues one Poolin Behary Mundul for the rent of bastoo land in the Small Cause Court side of this (Moonsiff's) Court. Instead of subscribing the plaint herself, she causes it to be signed by a duly certified Mookhtar, holding special powers of attorney, on her behalf. The question I submit for the opinion of the Honourable High Court is:—Whether, under the new Code of Civil Procedure, Act X of 1877, a plaintiff is bound to subscribe a plaint personally. Section 51 of Act X of 1877, unlike section 27 of Act VIII of 1859, only leaves the Court a discretion to permit some other person acquainted with the facts of a case to verify a plaint on behalf of a plaintiff. With respect to the subscription of a plaint the Legislature has purposely introduced a change and fettered the discretion of Courts. This will be evident on a careful perusal of sections 51 of Act X of 1877 and 28 of Act VIII of 1859 together. Now it will be seen whether the Legislature, while intending to make no change in the substance of the law, thought it fit to expunge the provisions bearing upon the subscription of plaints in the old Act on the ground of superfluity. Section 36 of Act X of 1877 in its terms is more comprehensive and general than the corresponding section in Act VIII of 1859 (section 16). The power to do any act in any Court accorded to recognized agents, seems at first sight to include the act of subscribing plaints, but then other difficulties crop up which render the solution of the point in question more intricate and difficult. The last paragraph of section 17 of Act VIII of 1859 provides that, whenever the personal appearance of a party to a suit is required by this Act, such appearance may be made by his recognized agent, unless

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MAHARANEE SURNOMOYE v. POOLIN BEHARY MUNDUL.

Judgment.

the Court shall otherwise direct; "and anything which by this Act is required or permitted to be done by a party in person, may be done by his recognized agent." The above quoted words of the section clearly confer upon recognized agents powers equal to those given by the new law. If, therefore, we read the last paragraph of section 17 in conjunction with section 16 of Act VIII of 1859, the conclusion would be that the new law does not extend the power and privileges of recognized agents, but consolidates the provisions of the old law into one section. Another point for consideration which suggests itself, bears upon the phrase, "and his pleader (if any)," in section 51. If any appearance, application or act in or to any Court required to be made by a party to a suit may, in the absence of *express* provision to the contrary, be made or done by a duly appointed pleader (section 36), then in every case in which a plaintiff engages a pleader the subscription by the pleader alone might be deemed sufficient and good. The conjunction "and" in the above cases loses much of its force. Sections 416, 417 and 418 of the new Code, which refer to suits by or against Government, lead to the inference that the law does not require the subscription of plaints personally by plaintiff in all cases. The Legislature, in enacting section 51 of the Code, did not, I believe, contemplate the subscription of plaints and written statements by the Secretary of State for India, personally. Irrespective of the provisions and wording of section 27 of the old Procedure Code, I am of opinion that the present law, Act X of 1877, does not, as a whole, make the personal subscription of plaints imperative in all cases. As however the subject is one of considerable difficulty, involving a nice question of law, I think it my duty to lay the case before the Honourable Court for an authoritative decision.

Baboo *Sreenath Doss* and Baboo *Gooroo Dass Banerjee*, for Plaintiff.

The judgment of the High Court (1) on the reference submitted is as follows :—

According to the decision of this Court, dated the 13th of February 1878, in the matter of *James Tweedie*, it is within the discretion of the Court to admit a plaint subscribed by the plaintiff himself or by an authorized agent. That also appears to be the practice adopted in the original side of this Court.

(1) MARKBY and PRINSEP, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

GRISH CHUNDER MOOKERJEE, TARINY CHURN CHATTERJEE . . . DEFENDANTS;

AND

MILLER AND OTHERS . . . . . PLAINTIFFS.

1878 *May 30th.*

Nos. 203 and 204 of 1876.

Fraud—Sale—Decree—Setting aside decree—Minor—Personal decree—Frame of suit—Form of decree—Party to suit—Execution of decree—Part payment.

A, "for self and as guardian of C, a minor," brought a suit for debt against B. In that suit, a part payment of the debt by B to A on account of C was suppressed, a personal decree was given against the minor, and, in execution of that decree, certain property belonging to the minor was sold. *Held*, in a subsequent suit by the minor, that the latter was entitled to have the decree and the subsequent sale set aside, as against a purchaser with notice, on the ground of fraud.

Semble, that the fact of a suit being brought by A, "for self and as guardian of C, a minor," is not conclusive evidence that C is not so far a party to the suit as to be bound by the decree.

Sreenarain Mitter vs. *Kristo Soondaree Dassee*, 11 B. L. R., 171, and *Mongola Dassee* vs. *Shoshee Bhooshun Kar*, 12 B. L. R., Appendix 2, cited.

REGULAR APPEAL from a decision passed by the Subordinate Judge of Nuddea, decreeing the plaintiffs' claim.

Baboo *Srinath Doss* and Baboo *Mohiny Mohun Roy*, for Appellants.

Mr. *Remfrey* and Baboo *Sham Lall Mitter*, for the Respondents.

The facts of the case are sufficiently set forth in the judgment of the Court (1), which was delivered by

MARKBY, *J.* :— MARKBY, *J.*

In this case the plaintiffs sued to set aside a certain decree obtained against two of the plaintiffs by the Subordinate Judge

(1) MARKBY and PRINSEP, *J.J.*

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Judgment.

MARKBY, *J.*

of Nuddea, and to stay proceedings in execution of that decree.

One Gooroodass Dass died in 1863, leaving six sons, who lived together as a joint Hindoo family. Doorgadass Dass, the eldest son of Gooroodass, died in December 1865, leaving two minor sons, being the two plaintiffs in the suit above-mentioned, against whom the decree was obtained which this suit was brought to set aside. The family was possessed of various properties, real and personal, and also of certain trades and businesses. On the 12th of March 1866, Nursing Persad Dass, one of the brothers, was appointed by the High Court receiver of the trades and businesses, another receiver being appointed for the rest of the property. In February 1873, five surviving sons of Gooroodass were declared insolvent, and all their property, moveable and immoveable, became vested in the Official Assignee. After this the defendant, Grish Chunder Mookerjee, sued the insolvents in the Court of the Subordinate Judge of Nuddea, and obtained a joint decree against all the defendants for Rs. 29,716-5-3. Proceedings in execution were taken, and certain properties belonging to the family were ordered to be sold in execution of the decree. The Official Assignee objected, but his objections were overruled, and he then at once filed this plaint against the execution order, joining with himself the two minor sons of Doorgadass Dass.

Subsequently, the plaintiffs filed a written statement, in which they stated that the sale had taken place, and that the property had been sold to one Tariny Churn Chatterjee for an inadequate price. They also stated that the decree in the suit by Grish Chunder had been obtained by fraud, and that the guardian of the minors had in that suit been guilty of misconduct. Tariny Churn Chatterjee was, on the 8th February 1875, made a party to this suit.

The Subordinate Judge held, *first*, that the minors were not parties to the suit in which Grish Chunder obtained his decree; *secondly*, that the decree in that suit, even if they were parties to the suit, was not binding upon the minors, by reason of the fraud of Grish Chunder and the misconduct of their guardian; *thirdly*, that the property of the insolvents was vested in the

Official Assignee, and therefore could not be sold under the decree against the insolvents; and he accordingly declared that the minors were not bound by the decree in Grish Chunder's suit, and that their interests and those of the Official Assignee were in no way affected by the sale in execution of that decree to the defendant Tariny Churn Chatterjee.

The two defendants have preferred separate appeals which have been heard together.

The decision of the Subordinate Judge upon the third point in favour of the Official Assignee has not been contested, and the points which have been argued here for the appellants are: (1) that the minors were parties to the suit brought by Grish Chunder; (2) that there was no fraud or misconduct which would vitiate the decree passed in that suit; and (3) that Tariny Churn, having purchased at a sale in execution of decree, had a good title notwithstanding any defect in the decree.

As regards the first point, we think the Subordinate Judge was wrong in saying that the minors were not parties to the suit of Grish Chunder. That suit was brought against (*inter alios*) Nursing Persad Dass for self and as guardian of the minors, Ashotosh Dass, and Mohetosh Dass, and Saroda Soondry Dassee, wife of the late Doorgadass Dass, second guardian of the minors.

No doubt the form of the suit is strange and incorrect, but there can be no question that the intention was to sue the minors, and if there had been no other objection to the decree, we should hold that it was binding on the minors. It is no doubt most unfortunate that more attention is not paid to these matters of form in the Mofussil Courts, but there is no authority for saying that where the minors have been really sued, though in a wrong form, a decree against them would not be valid. Neither the case referred to by the Subordinate Judge (11 B. L. R., 171), nor that cited by Mr. Hill (12 B. L. R., App., 2) go to that extent.

The next question is, whether the decree is void as against the minors by reason of the fraud of Grish Chunder or the misconduct of those who represented the minors in the suit. Three objections have been taken to the decree under this head: *first*, that the guardians allowed the minors to have a decree passed against them for debts which were barred; *secondly*, that there

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Judgment.

MARKBY, J.

should have been no personal decree at all against the minors; and, *thirdly*, that there should have been a plea of part payment which must have been proved.

It is not established to our satisfaction that the Statute of Limitations could have been successfully set up to any part of this claim; but there was certainly great negligence in allowing a personal decree to go against the defendants. It has indeed been doubted whether minors can be made liable for the trade debts of an ancestral partnership at all; and, although that doubt is now removed, still no Court would make minors liable for anything more than their share in the partnership property, and it was wholly wrong to allow a personal decree to go against the minors without objection. Apparently no separate defence was made at all to the suit of Grish Chunder by the guardians of the minor.

There was also gross misconduct, and even fraud, in the neglect to plead part payment. We think we cannot do otherwise than accept as true the statement of Grish Chunder, made on the 23rd February 1876, which was, that, on the 3rd April 1873, Rs. 1,000 were deposited with him by Nursing Persad Dass, and on the 15th January 1874 Rs. 6,000 more were deposited, on arrangement being made at the same time for the execution of a *kistibundee* for Grish Chunder's debt, with security for the balance. This arrangement not being carried out, Grish Chunder brought his suit, and obtained the decree which it is now sought to set aside; but the estate being already at that time vested in the Official Assignee, and for fear that money being found in the hands of Nursing Persad Dass he might be punished, he and Grish Chunder purposely abstained from saying anything about that deposit. This was a fraud on the part of Nursing Persad, who was managing the suit for the minors, and nothing else. No doubt he did not intend that the money deposited should go into Grish Chunder's pocket; but it left the minors at Grish Chunder's mercy, and it was a wilful withholding from the Court of facts which he was bound to disclose. We have no doubt whatever that as against the minors a decree so obtained is void.

It is also clear to us that Tariny Churn Chatterjee is in no better position than Grish Chunder himself. He is Grish

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Chunder's son-in-law; he had distinct notice at the time of the purchase, that the property which was being put up for sale had been made over to the Official Assignee, and that both the Official Assignee and the minors had instituted a suit, which was then under trial, to set aside the decree under which execution was proceeding. Tariny Churn having chosen to purchase after receiving that notice must take the consequences. He cannot claim that he was a *bonâ fide* purchaser who had a right to assume that the property was being sold under a valid decree. We think, therefore, that the decree of the lower Court was a right decree, and dismiss the appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

RAJENDRO NARAIN BISWAS . . . . . DEFENDANT;

AND

MOHENDOR LALL MITTER AND OTHERS . . PLAINTIFFS.

June 14th.

No. 662 of 1877.

Enhancement of Rent—Suit by co-sharer—Payment of rent separately—Co-sharers made Defendants.

A suit by the owner of an undivided share to enhance the rent of a jote, the tenant of which has been in the habit of paying his rent to each sharer separately, will not lie, even though plaintiffs' co-sharers be made defendants to the suit.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Rajshahye, affirming that of the Sudder Moonsiff of that district.

This was a suit for enhancement of rent, in which the question arose whether the plaintiffs, being only 8-anna sharers of certain mehals, could enhance the rent of the defendant, who held a jote therein, the plaintiffs' co-sharers being also made defendants. The lands were undivided, but the rent was collected separately by the sharers, and the plaintiffs put in evidence copies of decrees which they had obtained against the tenant defendant for their separate share of the rent.

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RAJENDRO NARAIN BISWAS v. MOHENDOR LALL MITTER.

Judgment.

The Court of First Instance decreed the claim, and this decision was upheld on appeal. Defendant then specially appealed to the High Court.

Baboo *Mohini Mohun Roy*, for Appellant.

Baboo *Chunder Madhub Ghose*, Baboo *Hem Chunder Bannerjee*, and Baboo *Obhoy Churn Bose*, for Respondents.

The judgment of the Court (1) was delivered by

JACKSON, *J.*

JACKSON, *J.*:—

In my judgment, the plaintiffs, as owners of one-half interest in a jote held by the defendants, are not competent to sue for separate enhancement of the half rent, even though the co-sharer-owner of the other half interest is made a *pro formâ* party to the suit.

It appears to me that the effect of the defendant's holding the jote in question under two separate pottahs from the two co-sharers is simply to place them under the obligation of paying their rent separately to each of the two, but that the lands being undivided, the tenure continues to be one; and it seems to me to make no difference whether the land had originally been held under one person, and has afterwards in course of time been held under different co-sharers, or whether the holding had commenced at a time when the co-sharers were separate in interest, and in letting the lands chose to take separate engagements.

I observe that the plaintiffs, in framing their plaint for the purposes of this enhancement, thought it necessary to represent that the defendant held 136 beegahs as half of the 273 beegahs, constituting the entire holding; and it is clear that that was resorted to for the purpose of giving colour to the demand for enhancement. Indeed the plaint had annexed to it a *chitta*, filed by the plaintiffs, showing the *daghs* and boundaries of the entire holding. If the plaintiffs could point out that certain specific *daghs* were held separately under them, and sought to enhance the rent of such *daghs*, the case would have been different.

(1) JACKSON and TOTTENHAM, *J.J.*

But it is clear, as I understand, that the land here is undivided; that merely the payment of rent is divided; and there seems to me nothing in the recent judgment of the Full Bench (1) which favors the contention of the respondents.

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I think the judgment of the lower Appellate Court is erroneous, and must be set aside, and the plaintiffs' suit dismissed with costs.

(1) *Sheikh Gani Mahomed* vs. *Moran*, 2 C. L. R., 370.

[CIVIL APPELLATE JURISDICTION.]

RAM KOOMAR KYBURTO DASS. . . . . PLAINTIFF;

AND

SONATUN DASS PORAMANICK AND ANOTHER. DEFENDANTS.

June 14th.

No. 2504 of 1876.

Misconduct of Judge—Refusal to hear Vakeel—Appeal—Petition—Ground of Appeal.

Where a party desires or intends to make the misconduct of a Judge a ground of appeal to the High Court, he ought always to draw the Judge's attention to that matter, either by presenting a petition or otherwise, so that a proper record may be at once made of the facts which he desires to establish in appeal.

Jardine vs. *Tarini Mohun Sen*, 6 B. L. R., Appendix, 44, distinguished.

SPECIAL APPEAL from a decree passed by the Second Subordinate Judge of Dacca, affirming that of the Moonsiff of Moonsheegunge.

Baboo *Bhoobun Mohun Dass*, for Appellant.
Baboo *Chunder Madhub Ghose*, for Respondent.

The facts are sufficiently set forth in the judgment of the High Court (1), which is as follows:—

We think that in this case we must accept the facts as stated by the Subordinate Judge, and these are, that after having read the judgment of the Moonsiff and the evidence in the case, and obtained some explanation from the only vakeel who was then

(1) MARKBY and PRINSEP, *J.J.*

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Judgment.

present on behalf of the appellant as to the facts of the case, he signified his opinion that there was nothing in the Moonsiff's judgment which was erroneous, and he says that upon that the vakeel who was present did not desire any further to argue the case; whereupon without any objection on the part of the vakeel who was present he commenced to write his judgment. Subsequently another vakeel, who had been instructed by the appellant, came in and desired to argue the case, and the Subordinate Judge did not think fit to grant him that permission.

Upon these facts it is quite clear that there was nothing erroneous in point of law in the conduct of the Subordinate Judge. The case of *Jardine* vs. *Tarini Mohun Sen* and others, which has been referred to, in 6 B. L. R., App., p. 44, is quite different. The sixth ground of appeal there was that the lower Appellate Court had dismissed the appeal after hearing the respondent's vakeel without giving the appellant's vakeel an opportunity to reply. The only pleader who was present in this case, and therefore the only party who had a right to be heard, did not choose to avail himself further of that right. No doubt the account given by the pleaders of what occurred differs very substantially from that which is given by the Subordinate Judge; but, as I have said before, we are bound to accept the account of the matter given by the Subordinate Judge.

We think it desirable to point out that in a case of this kind, if the party desires or intends to make the misconduct (because that is what it amounts to) of a Judge a ground of appeal to this Court, he ought always to draw the Judge's attention to that matter, either by presenting a petition or otherwise; so that a proper record may be at once made of the facts which he desires to establish in appeal. In this case only a very meagre certificate was put in when the petition of appeal was presented. The affidavit was not sworn until more than a year after the circumstance had occurred, which is made the subject of complaint. The appeal will be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

KOYLASH CHUNDER PAUL CHOWDHRY . PLAINTIFF;

AND

PREONATH ROY CHOWDHRY AND OTHERS . DEFENDANTS.

1878
June 27th.

No. 1414
of 1877.

Limitation—Execution of Decree—Intervenor—Act VIII of 1859, *sec.* 246—*Act IX of* 1871, *Sch.* II, *cl.* 15.

In execution of a decree obtained by A against B, certain property was attached. C intervened, claiming the property as his, but an order was passed under section 246, Act VIII of 1859, disallowing the claim. More than twelve months from the date of the order C brought a suit for establishing his right to the property. *Held*, that the suit was not barred by the provisions of cl. 15, sch. II, Act IX of 1871.

SPECIAL APPEAL from a decree passed by the Second Subordinate Judge of 24-Pergunnahs, affirming that of the Moonsiff of Satkhira.

In this case, the plaintiff, Koylash Chunder Paul Chowdhry, bought the land in dispute from the former owner, Rohen Kuddos Mullick, and obtained possession thereof in 1873. In 1874, the defendants obtained a decree against Rohen Kuddos Mullick, in execution of which they attached the land in possession of plaintiff. Plaintiff intervened under section 246, Act VIII of 1859, but his claim was disallowed on the 24th of April 1875, the execution proceedings were continued and the property sold. Plaintiff then brought the present suit, for "upholding possession by establishing his right" to the above-mentioned lands, on the 30th of May 1876. Both the lower Courts dismissed the suit as barred by limitation, holding that the suit was governed by cl. 15, sch. II, Act IX of 1871. Plaintiff specially appealed to the High Court.

Baboo *Rash Behary Ghose*, for Appellant.

Baboo *Nilmadhub Bose* and *Kally Mohun Dass*, for Respondents.

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The judgment of the High Court (1) is as follows :—

This was a suit instituted on the 30th of May 1876. The tation therefore which is applicable is that which is contain Act IX of 1871. The suit is brought, not to set aside order, but to establish the plaintiff's title to the property the Court has ordered to be sold, and which has been so execution of a decree to which the present plaintiff was no The plaintiff had appeared and asked the Court to releas property from attachment, but the Court refused his applic and ordered the property to be sold.

Until the time when Act IX of 1871 came into forc suit ought to have been brought within one year from the of the order rejecting the plaintiff's application to get his perty released from attachment, by reason of the last twelve of section 246 of Act VIII of 1859. These twelve having been repealed, we must now look to Act IX of 18 see what provision is applicable. The provision upon whic Subordinate Judge relies is that which is contained in 15, schedule II of that Act. He considers that to be a re-e ment of the repealed portion of section 246 of the Proc Code of 1859. It appears to me to be nothing of the That clause relates to a suit brought to set aside a sum order. But, as I have pointed out, this is not a suit to set a summary order at all. This is a suit brought to establis plaintiff's right. It is clear that no advantage can po accrue to the plaintiff by setting aside a summary order directed this property to be sold in execution, because the perty has already been sold. Therefore, the setting asi the summary order, refusing to release the property from a ment, would be no advantage to the plaintiff whatsoever. he wanted, and what he asked for, was a declaration tha property belonged to him; and I see no possible means by clause 15 of schedule II can be applied to such a case as thi in any case it is necessary to set aside the summary order, no doubt, the suit must be framed so as to have that effect then that clause will apply; but if the plaintiff can get a

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Judgment.

relief he wants without setting aside the summary order, then he may get that relief without regard to clause 15. I find it wholly impossible to distinguish this case from that which is reported in the August number of the Law Reports, page 26, edited by Joy Govind Shome, when we fully considered that matter and came to the conclusion that as long as a plaintiff does not seek to set aside a summary order, he cannot be brought within clause 15 of the 2nd schedule. We think, therefore, that the lower Appellate Court was wrong, and that the suit ought to have been tried.

The decision of the lower Appellate Court will be set aside, and the case remanded to the Moonsiff to be tried on the merits. Costs will abide the result.

NOTE.—In the present Limitation Act, only one year is allowed for a suit to establish a right to or to the present possession of property which has been the subject of an order under sections 280, 281 or 282 of the new Code of Civil Procedure (corresponding to section 246, Act VIII of 1859). —See Act XV of 1877, sch. II., art. 15.

[CIVIL APPELLATE JURISDICTION.]

1878
June 28th.

No. 994
of 1877.

NUFFUR ALI BISWAS. . . . . DEFENDANT;

AND

RAMESHAR BHUNICK . . . . . PLAINTIFF.

Mesne Profits—Wasilat—Putnee Talook—Arrears of Rent—Setting aside sale—Durputnee.

A zemindar granted a putnee to A, who granted a durputnee to B. The putnee was sold for arrears of rent to C, who entered into possession, cancelled B's durputnee, and, after two years' possession, granted a durputnee to D. Meantime A, the original putneedar, had the sale set aside in a regular suit brought for that purpose, and thereupon B brought a suit against D alone for mesne profits.

Held, that D was entitled to be credited with the amount of rent which he had paid to his putneedar C, and with the expenses of collection.

SPECIAL APPEAL from a decree passed by the Judge of Nuddea, modifying that of the Subordinate Judge of that district.

Baboo *Mohinee Mohun Roy*, and Baboo *Biprodass Mookerjee*, for the Appellant.

Baboo *Hem Chunder Bannerjee*, and Baboo *Doorga Dass Dutt*, for Respondent.

The facts of the case are sufficiently set forth in the judgment of the High Court (1) which is as follows:—

There is no doubt that this is an extremely difficult case, and one of a very peculiar kind. It seems that there was a putneedar named Mostafi, who had granted a durputnee to the plaintiff. There was then a sale of the putnee for arrears of rent by the zemindar. Two persons, named Biswases, had purchased the putnee and entered into possession. After they had been in possession for two years they gave a durputnee lease to the defendant, and the defendant was in possession for the year 1278. But before the defendant got into possession, a suit had been brought by Mostafi to set aside the putnee sale, and he, in the year 1281, succeeded in getting the sale set aside. Then the plaintiff

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being thereby restored to his rights as durputneedar, got back into possession, and now sues the defendant for mesne profits of the year 1278, during which the defendant was wrongfully in possession. The durputneedar has not thought proper to sue the Biswases who purchased the putnee at the auction sale and turned him out, nor any other person responsible for the sale. He makes his claim only against the defendant who held under a durputnee lease from the auction-purchasers.

Now, it may be that if the plaintiff had joined the auction-purchasers in this suit, he might have been able to compel those two persons jointly to account for the whole of the rents and profits of the year 1278. He might have been able to treat them as joint wrong-doers and make them jointly liable, leaving them to settle as they could their account between themselves. But having taken the course which the plaintiff thought fit to pursue, of suing the defendant alone, we think that it would not be right to make him liable for more than the profits which he actually received. No doubt the defendant and the auction-purchasers between them are accountable for the whole of the rents and profits for the year 1278, but inasmuch as the plaintiff has chosen to sue the defendant separately, it seems to us that the only equitable decision that there can be is, to make him liable for that which he himself actually received, and he must also have a right to set off the rent which he paid to his lessors, there being no other way in which he could recoup himself of that rent. If we were to make him liable for the profits, which he received, without giving him credit for the rent which he paid to his lessors, he would be made liable for very much more than he ought to be made liable for ultimately in this matter. The account will, therefore, be taken upon that basis.

The case will go back for the account to be taken. In taking the account everything which the defendant collected will have to be brought into account. He will be entitled to a deduction for collection charges and the amount which he actually paid to his lessors. The plaintiff will be entitled to interest from 1278 at six per cent. per annum down to the date of the decree, upon any amount that will be found due, upon taking the account. Costs will abide the result.

[CIVIL REFERENCE.]

1878
July 5th.

MOONSHEE HOSSEIN ALLY . . . . . PLAINTIFF;

AND

ASHOTOSH GANGOOLLY . . . . . DEFENDANT.

Execution of Decree—Small Cause Court—Jurisdiction—Transfer of Decree for Execution—Act X of 1877, *section* 268—*Act XI of* 1865, *section* 20.

Except in the manner allowed by section 20, Act XI of 1865, the Judge of a Small Cause Court cannot now send a decree of his own Court for execution by another Court, nor can he issue an order under section 268, Act X of 1877, out of his own jurisdiction.

REFERENCE under section 617 of the Code of Civil Procedure, 1877, from the Judge of the Court of Small Causes at Sealdah. The case is stated as follows :—

In the course of proceedings for the execution of a decree in the above suit, an order under section 268 (c) was issued to a certain firm in Calcutta prohibiting them from making over to the judgment-debtor a certain sum of money in their possession. The order was served upon a partner of the firm in the usual manner, through the Calcutta Court of Small Causes, and payment of the money was duly withheld. The judgment-debtor has now applied for the release of the money, on the ground that this Court is not empowered by the Act to issue such orders beyond the local limits of its own jurisdiction. It is clear that sections 223 to 229 of the Act have not been extended by schedule II to Small Cause Courts; and, therefore, as regards the issue of certificates against moveable property for execution by another Court, no authority appears to be vested in Small Cause Courts—a deficiency in the Act which is much to be regretted, and regarding which I have already submitted a reference. But, as respects prohibitory orders issued under section 268, which is made applicable to Small Cause Courts, I entertain some doubt. It is not necessary in such cases to act under the provisions of sections 223 and 224, by sending the decree for execution to another Court, but simply by the issue of an order directed to the person in possession of the moveable property, which may be served as any ordinary process, summons or subpœna out of jurisdiction, and therefore I incline to the opinion that this Court is not restrained from carrying out its own order of prohibition.

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The judgment of the High Court (1) on the reference submitted, is as follows :—

Except in the manner allowed by section 20, Act XI of 1865, the Judge of a Small Cause Court cannot now send a decree of his own Court for execution by another Court, nor can he issue an order under section 268, Act X of 1877, out of his own jurisdiction.

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[PRIVY COUNCIL.]

May 29th.

TEKAIT DOORGA PERSAD . . . . . PLAINTIFF;

AND

TEKAITNI DOORGA KOONWARI AND ANOTHER . . . DEFENDANTS.

Res Judicata—Custom—Family Custom—Koolachar—Impartible property—Mitakshara Law.

A, claiming as heiress of her deceased son, brought a suit against B and others, for possession of a certain talook, and obtained a decree. In that suit B claimed the talook as the heir of A's son, according to the *Mitakshara* law, and alleged that after the death of A's son he, B, had been installed as *gudinashin* according to ancient usage. Subsequently, B filed a suit, claiming possession of the talook from A on the ground that by a *koolachar*, or family custom, he was entitled to succeed as heir to A's son. *Held*, that the second suit was barred as *res judicata*.

Taver vs. *Rajah of Shivagunga*, 11 Moore's Ind. App., 73; *Krishna Behari Roy* vs. *Brojeswaree Chowdhranee*, L. R., 2 Ind. App., 283; *Soorjomoney Dayee* vs. *Suddanund Mohapatter*, 12 B. L. R., 304, cited and followed.

Chiniya Mudali vs. *Vankatachella Pillai*, 3 Madras H. C. R., 320; and *Shaikh Ramatullah* vs. *Shaikh Sarintullah*, 1 B. L. R., F. B., 68, overruled.

APPEAL from a decision passed by the High Court of Judicature at Calcutta, (PONTIFEX and KEMP, *J.J.*,) dismissing the plaintiff's suit with costs.

The facts of the case are sufficiently set forth in the judgment of the High Court, (which will be found reported in 20 W. R.,

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Judgment.

154,) and in the following judgment of their Lordships of the Privy Council (1) :—

This is a suit brought by Doorga Persad Singh, son of Gopi Nath Singh, alleging himself to be the proprietor of Talook Guddi Chakai and other property in Zillah Monghyr. The suit is against Tekaitni Doorga Koonwari, widow of Futteh Narain Singh, deceased, and mother of Gurbh Narain Singh, deceased, and also against Maharajah Joy Mungul Singh. It was brought, first, to obtain possession from the widow by adjudication of the right to inheritance of the plaintiff in accordance with *koolachar* or family usage in reference to the property in suit left by Tekait Gurbh Narain Singh, son of the late Futteh Narain Singh; secondly, for an adjudication and order, with respect to the right of reversion to the said estate, that a deed which had been executed by the widow in favour of the defendant Joy Mungul Singh, should be declared illegal and inoperative after the decease of the widow, the defendant No. 1.

The property was formerly the property of Dhurm Narain Singh, and their Lordships think it must be taken to be joint ancestral property, although impartible. Upon the death of Dhurm Narain Singh, who left several sons and other lineal descendants, the property descended to his grandson, Loke Narain Singh, the father of that grandson, Juggernath Singh, having died in the lifetime of Dhurm Narain. Upon Loke Narain Singh's death the estate descended to Futteh Narain Singh, the husband of the present defendant No. 1. Futteh Narain Singh left three widows, who, upon his death, claimed to have the estate registered in their names. The present plaintiff intervened before the Collector and objected to the registration of the property in the names of the three widows, but the Collector decided in favour of the widows, and their names were registered as the proprietors of the estate upon the death of Futteh Narain. After that registration, the present defendant gave birth to a son, Gurbh Narain Singh, who lived for a short time and died in his infancy. The plaintiff claims that upon the death of Gurbh Narain he was entitled to

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succeed to the estate, and that the widow was not entitled, according to the Mitakshara law and the custom of the family, to succeed as the mother and heiress of her son.

With regard to the claim to recover possession from the widow, the answer set up is, that a former suit was brought by the widow after the death of her son, for the purpose of recovering possession of two-thirds of the property from the other two widows, with whom the present plaintiff was said to be in collusion, and also to have her possession confirmed as to her own one-third. A decree was given in that suit in favour of the present defendant, the widow, who was the plaintiff in that suit. The plaint in that suit is not in evidence, but it is to be collected from the judgment of the Court of First Instance in that suit that it was brought by the present defendant as mother and heiress of Gurbh Narain Singh, deceased. The present plaintiff as defendant in that suit, in his written statement, which is set out in the record, set up the following defence: He said:—"The plaintiff is not entitled to succeed to the properties left by Tekait Futteh Narain Singh. The aforesaid Tekait during his lifetime, and after his death, his widows and the minor son which was born to him, lived in commensality with me, the defendant. The whole of the property in suit is ancestral, hence, according to the Mitakshara shastra, after the death of the said Tekait and his minor son, I, the defendant, the paternal cousin of Tekait Futteh Narain Singh, am entitled to the ancestral estates." He then goes on in the fourth paragraph:—"On the 13th Jeyt 1274 Fusli, I, the defendant, on account of my being the rightful party, was, by the consent of all the three widows of Tekait Futteh Narain Singh, the amlahs, ryots, and lessees and others, installed as the *gadinashin* of Talook Chakai according to the usage which has prevailed of old. Since that date I have been in possession of all the mouzahs in suit." He then says that he was installed according to the usage, and therefore it may be taken that, notwithstanding the estate was joint family property, he claimed to be installed, because according to the family usage it was an impartible estate to which he, as the eldest branch of the family, was entitled to succeed. The Court of First Instance in that suit decided that the claim of the plaintiff be decreed with this specification:—"That

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the plaintiff aforesaid do recover possession of two-thirds of the estate claimed," that is, the two-thirds which were held by the other widows with whom the defendant was alleged to be colluding, "and that her possession of one-third be confirmed." There was, therefore, a decision in that suit between the plaintiff, who is the present defendant, and the present plaintiff, who was the defendant, that the widow was entitled to succeed as the mother and heiress of Gurbh Narain Singh, her son. An appeal was preferred to the High Court, and the High Court affirmed that decision.

The question now is, whether, in the face of that adjudication, the plaintiff is entitled in this suit to recover possession of the property upon the ground that he and not the defendant as mother of Gurbh Narain was entitled to succeed upon his death. It is contended on behalf of the plaintiff that he did not in that suit set up the family usage which has been set up in the present suit, and that consequently the adjudication in the former suit is no bar to his recovering possession. The case of *Hunter* vs. *Stewart*, 31 Law Journal, Chancery, page 346, was cited, in which Lord WESTBURY held that, as the allegations and equity in the first suit were different from the allegations and equity in the second suit, the decision in the first suit was no bar to the proceedings in the second. But there it was expressly stated that the equity in the second suit was different from that which had been set up in the first suit, and that the allegations were also different. In this case, although the allegations are different, the case is the same. The claim on the part of the widow in that suit was based upon her title to succeed as the mother and heiress of her son. The present plaintiff, who was the defendant in that suit, relied upon his own title, and denied that of the mother, the present defendant No. 1, but it was adjudged against him, that the mother was entitled to succeed as the heiress of her son.

In a case which was referred to in the judgment of the High Court, reported, 11 Moore's Indian Appeals, 73—*Taver* vs. *The Rajah of Shivagunga*, it is said, in the judgment pronounced by Lord WESTBURY, "When a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound

to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward." If the defendant did not resist the claim in the former suit on the ground of family custom, he is not entitled in the present suit to upset the former decision, because he failed to set up a custom which he ought to have relied upon at the time. The decision in the former suit would be utterly useless if the present suit could be maintained. The plaintiff in his present suit, in the 8th paragraph of his plaint, says, "on the strength of the aforesaid decree, the defendant No. 1," that is, the widow, "put your petitioner out of possession." If that decision was correct, she was entitled to put him out of possession. But in the next paragraph he says, "the cause of action arose from the said date when your petitioner's dispossession took place." In effect, he says, that although the mother took possession under the decree in the former suit, the taking of possession under that decree gave him a right to sue her to recover the possession back again from her. If such a suit could be maintained there would be no end to litigation.

A case was referred to from the third Madras High Court Reports, page 320—*Chinniya Mudali* vs. *Venkatachella Pillai*, in which Chief Justice SCOTLAND seems to have been of opinion that if the same facts were not set up in the former suit a decision in that suit would not be a bar in the second suit. The ground, however, upon which Chief Justice SCOTLAND thought that the former judgment could be impeached, was that the Court had refused in the first suit to allow the party who wished to impeach the judgment to go into the case which he set up in the second suit.

In the second Law Reports, Indian Appeals, 283—*Krishna Behari Roy* vs. *Brojeswari Chowdhranee*, a similar question was brought before the Judicial Committee. It is said, in the judgment delivered by Sir MONTAGUE SMITH, "It was suggested by Mr. Cave that the former judgment ought not to be binding, because certain witnesses having been examined before the present appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence

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arising from the former judgment. If there had been any miscarriage of that kind the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals that were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that that cannot affect the operation of the final judgment, which must be taken to have been rightly given."

But it appears at page 166 of the record in the present case that the family custom was brought before the Court in the former suit. They say:—"As to the third ground, Doorga Persad Singh attempted to give evidence that there is a family custom or *koolachar*, by which, in this family, females were excluded from inheritance. He did not make any averment to that effect in his written statement, and, therefore, did not, perhaps would not, pledge himself to it on oath or solemn affirmation. He did not give the plaintiff any warning that she would have to meet any such case. No issue was raised on it, and down to the time when he examined his witnesses, and even in his written grounds of appeal before us, there is no statement of the particulars of this custom or *koolachar* the existence of which he now suggests. He does not even aver in his written grounds of appeal that such a custom is proved."

It was contended that the cause of action in the suit in which the present defendant was plaintiff was not the same cause of action as that which is set up by the plaintiff against her in the present suit. A similar point was considered in the case reported in the second Law Reports, Indian Appeals, page 283, to which reference has already been made. It was there said: "Both the Courts below have held that the present suit is barred by reason of the judgment in the former one. The ground of the present appeal is that they were wrong, inasmuch as it is said that the case does not come within section 2 of Act VIII of 1859. Now the section is this: 'The Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.' Their Lordships are of opinion that the expression 'cause of action' can-

not be taken in its literal and most restricted sense. But however that may be, by the general law, when a material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them." It is not necessary for their Lordships to go at length into the reasons for their decision; because those reasons appear in a recent judgment of this Board in the case of *Soorjomonee Dayee* vs. *Suddanund Mohapatter*, 12 B. L. R., 304. In that judgment it is said, after reference to the second clause of Act VIII, "their Lordships are of opinion that the term 'cause of action' is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause was in substance to declare the will invalid on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata* founded on the principle '*nemo debet bis vexari pro eadem causa.*' This law has been laid down by a series of cases in this country with which the profession is familiar. It probably has never been better laid down than in a case which was referred to in volume 3 of Atkyn's—*Gregory* vs. *Molesworth*, in which Lord HARDWICKE held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form, and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the 'Duchess of Kingston.' A decision of the High Court of Bengal has been referred to, the case of *Sheikh Ramatulla* vs. *Sheikh Sariutulla Kagchi*, 1 B. L. R., F. B., 68, as having a contrary tendency. All their Lordships desire to say of it is that, as reported, it does not appear to be consistent with their judgment in the former appeal, to which they have referred, nor with their opinion on the present case. The decision is of so recent a date that they desire to say no more upon it."

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Judgment.

Their Lordships think it clear that the decision in the former suit, that the plaintiff as mother was the heiress of her son, and that she as such heiress was entitled to possession, is conclusive against the present plaintiff, who was a party to the suit, that she was so entitled, and that she having taken possession under that decree, the plaintiff is barred by the adjudication from recovering the possession from her upon the ground that she is not the heiress, and that he was entitled to succeed to the property upon the death of her son.

As to the second portion of the claim, namely, whether the plaintiff is entitled to have it declared that the deed which the widow executed in favour of Joymungul is void and invalid as against the reversionary heirs, the plaintiff must prove that he is the person presumptively entitled to succeed upon the death of the defendant No. 1. No doubt the family custom might be set up in this suit for that purpose; for, although the plaintiff is barred by the former adjudication from setting it up for the purpose of showing that he is entitled to possession during the life of the defendant No. 1, he is not thereby barred from showing that upon her death, he, if he survives, will be entitled to succeed her. See the case of *Barrs* vs. *Jackson*, 1 Young and Collier, 582.

The plaintiff in his plaint says:—"The aforesaid estate was originally the ancestral property of the ancestors of Tekait Dhurm Narain Singh, the ancestor of the plaintiff. The aforesaid property as a Raj is not divisible, and according to the ancient family usage the succession has always run in this manner, that the eldest male heir of the superior branch succeeds to the entire estate to the exclusion of other male heirs of the inferior branch, who only receive suitable maintenance; no widow or any female heir after the decease of the proprietor acquires a right to succeed. In the event of the decease of the proprietor of the mehal in dispute, leaving a female heir or male heirs who have descended from females, the eldest male heir of the eldest branch of the second degree, which said branch may have descended from males, becomes the heir and successor, to the exclusion of females and the aforesaid heirs. In fact this practice obtains in other zemindaries, known as Gadis, in Pergunnahs Chakai and

Khurugdiha in the neighbourhood of Talooka Chakai, the proprietors and occupants whereof are of the same caste as the plaintiff and his ancestors. Conformably to this ancient usage, the property in suit passed to the late Tekait Futteh Narain Singh, and after him to the late Gurbh Narain Singh, son of the aforesaid Futteh Narain Singh. Tekait Gurbh Narain Singh died a minor unmarried in the month of Cheyt 1272 F.S., leaving plaintiff, the eldest male heir in the eldest branch of second degree of the said family, and, according to the family usage, your petitioner is entitled to succeed to the disputed property." Then he mentions the former suit, and says:—"Should your petitioner not be held entitled to immediate possession of the property in suit, he, as the next heir, is entitled (consistently with the practice of succession referred to above) to the reversionary right in the property after the decease of the defendant No. 1. The alienation of the said six annas, which is alleged to have been made for the payment of bond debts, was not made for such a purpose, by which, in the event of the defendant No. 1 being a female heir, such alienations would be binding upon the reversioner, nor was it made under legal necessity, which entitles the purchaser to hold possession for a longer period than the lifetime of the vendor. Your petitioner therefore prays that he may be put in possession of the property in suit, but should the Court not deem him deserving of this relief, that an order be passed in reference to the aforesaid alienation, declaring the said alienation ineffectual after the demise of the defendant No. 1, and that the reversioner is not bound by it."

In the present case there are other members of the joint family nearer in degree to the deceased Gurbh Narain than the present plaintiff, and who, in the absence of family custom, might be entitled (under the ordinary Mitakshara law) to succeed to the estate, assuming it to be joint family property; indeed, that fact was not disputed. The impartibility of the property does not destroy its nature as joint family property, or render it a separate estate of the last holder, so as to destroy the right of other member of the joint family to succeed to it upon his

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death, in preference to those who would be his heirs if the property were separate. The rule upon this subject was stated in the *Shivagunga* case, 9 Moore's Indian Appeals, 588. It is there said :—" The zemindary is admitted to be in the nature of a principality—impartible and capable of enjoyment by only one member of the family at a time." But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindoo law, prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject. Hence if the zemindar at the time of his death and his nephews were members of an undivided Hindoo family, and the zemindary, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the zemindar at the time of his death was separate in estate from his brother's family, the zemindary ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter preferably to nephews, following the course of succession which the law prescribes for separate estate. These propositions are incontestible; but Gouri Vallabha Tevar's widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that, even if the late zemindar continued to be generally undivided in estate with his brother's family, this zemindary was his self-acquired and separate property."

The same rule was laid down by their Lordships in a recent case which was decided on the 12th February in the present year, (1) the case of *Periasami* vs. *The Representatives of Salugai* at page 5 of the printed report :—" It may be desirable, before their Lordships approach the direct question to be decided, briefly to recapitulate some of the facts relating to this estate. Oiya Tevar, the then zemindar of Pudamattur, died in 1815. He was succeeded by his eldest son, Muttu Vaduga. That person had two brothers, and therefore, whether Oiya Tevar were previously joint with his brother Gouri Vallabha, the istimirar zemindar of Shivagunga, in respect of Padamuttur or not, the later estate m

(1) Reported, L. R., 5 I. A., 61 ; 2 C. L. R., 81.

be taken to have descended to Muttu Vaduga, as ancestral estate. He would, therefore, necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindoo family in the case of a Raj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate, though impartible, was, up to the year 1829, in a sense the joint property of the joint family of the three brothers."

Unless, then, the plaintiff can establish the family custom or *koolachar* which he has set up, he is not entitled to sue for a declaration in respect of the deed. Two issues were raised as to the alleged custom—First: "Is there a *koolachar* in the family by which females are excluded from succession or not?" And secondly: "Does the law of primogeniture regulate the succession to property in the family or not? The Judge of the first Court did not decide them. He merely ordered that a decree be passed in favour of the plaintiff in this way: that the plaintiff should be taken to be the next heir after the death of Mussamut Doorga Koonwari, the defendant, and that at that time he would be competent to bring a suit for the cancelment of the deed of sale executed in favour of Maharajah Joymungul Singh. He came to that decision upon the ground that other nearer heirs had not come in to dispute the plaintiff's right, but he did not express any opinion as to the evidence which was given in support of the custom.

Upon appeal from that decision to the High Court, that Court found that the custom had not been proved. They say at page 237:—"We are of opinion that no family usage or *koolachar*, either excluding females or giving the preferential right of succession to direct descendants in the eldest male line, has been proved. Nearly the whole of the instances adduced by the witnesses as proof of *koolachar* must be referred to succession to undivided estate under the Mitakshara law." In a subsequent part of their judgment they say:—"In fact all the witnesses rely principally on local custom as applying to Soorujbunsi Rajpoots. The evidence shows that in Pergunnah Purra, a ghatwali

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zemindari in Beerbhoom held by Soorujbunsi Rajpoots, a woman had succeeded. We are of opinion that the evidence fails to prove any family or local custom excluding the succession of females, and also fails to prove a *koolachar* or local custom whereby the succession goes otherwise than under the ordinary Mitakshara law, as applied to impartible estates, under which it is admitted that the plaintiff would not, under existing circumstances, be the next reversioner, inasmuch as there are at least two persons who would be preferential heirs to him with respect to local custom. Even if the plaintiffs were entitled to raise that question in the case, which we think he is not, *we are of opinion that there is no defined district pointed out over which the alleged custom extends.*" (1)

This is not a case in which the Court was called upon to set aside the deeds. It was merely asked to declare that the deed to Joymungul was not binding against the reversioner. It is entirely a matter of discretion, whether to make any declaration to leave the question open until the widow's death.

There is very conflicting evidence with regard to the deed, and as to the existence of such a necessity for the first defendant's alienating a portion of the estate would render the deed in favour of Joymungul valid against a reversionary heir. If it could be proved that there was a legal necessity for raising a portion of the money which formed the consideration for the deed, but not the whole of it, the deed would not be wholly void as regards the plaintiff, but would be valid as against him to charge the estate for the amount necessary to be raised. The evidence is not such as to enable their Lordships to determine what, if any, portion of the advances made to the defendant No. 1 were made for purposes for which, according to Hindoo law, she would, as an heiress, have been entitled to alienate the estate. Therefore, even if their Lordships should affirm the findings upon the first and second issues of fact in favour of the plaintiff, it would be necessary to remit the case to the lower Court to inquire whether all or any, and, if any, what part of the advances which formed the consideration for the deed

(1) The quotation, as given in the official report of the Privy Council judgment, does not include the words in italics.

were made for purposes for which the defendant No. 1 could lawfully alienate a portion of the estate—a course which was adopted in the case reported in 8 Moore's Indian Appeals, 556—*The Collector of Masulipatam* vs. *Cavaly Vencata Narainapah.*

Such an inquiry would be attended with considerable expense, and would cause great delay, and if the inquiry should result in a finding favourable to Joymungal, the decision might not be final in his favour, because the present plaintiff might die in the lifetime of the widow, and the estate might never come to him. Further, there are others who might prove a preferable title to the plaintiff and to the defendant No. 1, and who would not be bound by any decision in this, or in the former suit, to which they are no parties. It appears, therefore, to their Lordships that they would not be exercising a sound discretion in sending the case for a further inquiry, which, after causing considerable expense and delay, would not be binding upon the whole family.

Under these circumstances, therefore, their Lordships think that they ought not to advise Her Majesty to make a declaratory decree with respect to the deed executed in favour of Maharajah Joymungal Singh. In this view of the case any finding upon the first and second issues of fact becomes unnecessary, and their Lordships abstain from expressing any opinion as to the finding, or rather the expression of the opinion, of the High Court, upon those issues, so that it may be left open to all parties hereafter to raise the question as to the family custom set up by the plaintiff. Their Lordships will, therefore, humbly advise Her Majesty to set aside the finding of the High Court upon the first and second issues of fact as being unnecessary, and to affirm their decree dismissing the plaintiff's suit. It will then be open to any of the parties to raise the question of family custom hereafter, if they deem it necessary, and the decree in this suit will not be *res judicata* as to the first and second issues of fact. Their Lordships think that the appellant, having failed in his appeal, the great object of which was to recover possession from the widow, must pay the costs of this

[CRIMINAL REVISIONAL JURISDICTION.]

1878 June 8th.

No. 482 of 1878.

IN THE MATTER OF ABDOOL KADIR AND OTHERS (CONVICTS.)

Summary Jurisdiction—Splitting Offences—Offences triable summarily—Void Proceedings—Code of Criminal Procedure, section 34.

A Magistrate should not split up an offence for the purpose of giving himself summary jurisdiction. If he does so, and the offence is not triable summarily, the proceedings are void, under section 34 of the Code of Criminal Procedure.

REFERENCE from the Sessions Judge of Cuttack. The facts of the case are sufficiently shown in the Judge's letter, which is as follows:—

"Under the provisions of Circular No. 18 of 15th July 1863, and section 296 of the Criminal Procedure Code, I have the honor to submit, for the orders of the High Court, the records of *Empress* vs. *Abdool Kadir and others*, and of *Empress* vs. *Gholam Mahomed*. It seems to me quite clear that the Deputy Magistrate had no right to take the case up summarily, as it was alleged that the members of the alleged illegal assembly were armed. This being so, the offence was one under section 144, and not under section 143. In the same way, Gholam Mahomed, who is charged with hiring persons to join an unlawful assembly, was punishable, if the members of the assembly were armed, under the provisions of section 144, and therefore could not be tried summarily.

Mr. *M. L. Sandel* for the accused.

The judgment of the High Court (1) was delivered by

AINSLIE, J.

AINSLIE, *J.*:—

Section 274 of the Code of Criminal Procedure takes away the right of appealing, from persons convicted by Magistrates of the first class exercising summary jurisdiction, when the sentence is

(1) AINSLIE and BROUGHTON, *J.J.*

one of imprisonment not exceeding a term of three months. Therefore, in the present case, the convicted persons having been sentenced to a term not exceeding three months, are deprived of the right of appeal on the facts, if the Deputy Magistrate was right in trying the case summarily.

The Deputy Magistrate seems to think that the fact that he had not the police papers at the time that the prisoners were put on their trial, entitled him to deal with the case on the verbal statement of a Court Sub-Inspector. But, on looking at the record, it appears that the very first witness for the prosecution states distinctly that there were two persons, who appear to have been the leaders of the unlawful assembly (if the evidence of this witness is to be believed), armed with swords. It is quite clear that the Deputy Magistrate should have looked to the sworn evidence before him, and not to any verbal statement of a Court Sub-Inspector, for the purpose of determining how the trial was to be conducted; and when he found that the charge actually made before him was a charge which would not fall under any section of the Penal Code admitting of summary trials, the proceedings should have been framed as in ordinary trials.

If this conviction had been recorded under section 144, the accused would have had a right of appeal. This Court has frequently laid down that no Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself summary jurisdiction. If a charge of an offence, not triable summarily, is laid and sworn to, the Magistrate must proceed to deal with the case accordingly, unless he is, at the outset, in a position to show, from the deposition of the complainant, that the circumstances of aggravation are really mere exaggeration and not to be believed.

As the Deputy Magistrate was bound to treat this case as a charge under section 144; it follows from the construction that [illegible] been put on the 34th section of the Criminal Procedure Code, [illegible] we are bound to hold this proceeding void. All these proceedings must, therefore, be quashed, and the Deputy Magistrate [illegible] try the prisoners *de novo*. The same order will be made in [illegible] case of Gholam Mahomed.

[illegible]

1879 June [illegible]

No. [illegible] of 1878.

[illegible] DECREE-HOLDER;

AND

[illegible] JUDGMENT-DEBTOR.

Limitation—Execution of Decree—Sale in Execution—Setting aside Sale—Revival of Proceedings in Execution—Act [illegible] of 1871, Sch. [illegible], Art. [illegible].

A decree-holder, in execution of decree, sold some property belonging to the judgment-debtor on the 2nd of October 1871, and the execution proceedings were struck off on the 28th of February 1872. The judgment-debtor brought a suit, and had the sale set aside on the 14th of May 1873. In the 22nd of December 1874, the decree-holder again applied for execution. *Held*, that the application must be taken as one to revive the former proceedings of 1871, and that execution of the decree was not barred by limitation.

Hoobee Pyarro Tuhoobidarinee vs. *Syud Nazir Hossein*, 23 W. R., 183, cited and followed.

SPECIAL APPEAL from an order passed by the Judge of Sylhet, reversing that of the Moonsiff of Lushkurpore. The Moonsiff sets out the case as follows:—

"This is an application for execution of a decree. The original decree was obtained on the 31st of June 1871. The decree-holder executed the decree for the first time on the 10th of July 1871, and caused the debtor's properties to be sold, and the sale proceeds amounted to Rs. 354. The execution case was then struck off on the 28th of January 1872. It was renewed on the 22nd of December 1874, and the debtor has pleaded limitation, urging that as the sale took place on the 2nd October 1871, and an application for taking out execution afresh was made more than three years thereafter, *i.e.*, on the 22nd of December 1874, that execution was barred by limitation. In reply, the decree-holder contends that the sum of Rs. 354, which was the proceeds of the sale, had almost satisfied the decree, but the debtor applied to set aside the sale and the case was appealed against; that a considerable time elapsed pending the trial of that appeal; that ultimately the sale was set aside with directions to refund the

money to the purchaser, with interest, whereupon the decree-holder was under the necessity of refunding the above sale proceeds of Rs. 354; and that, as the case to set aside the sale was disposed of in appeal on the 14th of May 1873, and the present application was made within three years from the above date, the defect of limitation has not been incurred."

The Moonsiff cited *Maharajah Dhiraj Mahtab Chund* vs. *Bulram Singh*, 14 W. R., 21 P. C.; *Romanauth* vs. *Roy Lutchmiput Singh*, 19 W. R., 417; and granted the application. This decision was reversed on appeal to the Judge, who cited and distinguished the cases of *Booboo Pyaroo Tuhobildarinee* vs. *Syud Nazir Hossein*, 23 W. R., 113, and *Paras Ram* vs. *Gardener*, I. L. R., 1 Alla., 355. The decree-holder appealed specially to the High Court.

Baboo *Bharrut Chunder Dutt*, for Appellant.
Baboo *Protab Chunder Mozoomdar*, for Respondent.

The judgment of the High Court(1) is as follows:—

In this case the decree was passed on the 21st of June 1871, and the decree-holder applied to execute this decree on the 10th of July 1871. Upon that application the necessary steps having been taken, the property of the judgment-debtor was brought to sale on the 2nd October of the same year, and almost the whole of the decree was satisfied from the proceeds of the sale. After that the execution proceedings were struck off on the 28th of February 1872. It appears that the judgment-debtors in the meantime applied to have the sale set aside, and the proceedings connected with that application continued pending till the 14th of May 1873, when the sale was set aside and the decree-holder was directed to refund the sale proceeds which he had withdrawn from the Court. On the 22nd of December 1874, the decree-holder again applied to execute his decree. Upon this, the judgment-debtor resisted that application on the ground that the proceedings are barred by the law of limitation. The Moonsiff was of opinion that this objection ought not to prevail, and he

(1) MITTER and MACLEAN, *J.J.*

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accordingly allowed the execution to proceed. The judgment-debtor appealed against that order, and the District Judge has reversed the order of the Moonsiff. The District Judge is of opinion that the application, dated the 22nd of December 1874, having been presented more than three years from the last application to execute the decree, namely, from the application of the 10th of July 1871, under Article 167 of the Limitation Act of 1871, the decree was incapable of execution. He accordingly decreed the judgment-debtor's appeal.

In special appeal, the decree-holder contends that, although, in form, the application of the 22nd of December 1874 was an application to execute the decree, in substance, under the circumstances of the case, it should be considered as an application to continue the old proceedings. We think that this contention is valid. It is true that the Court executing the decree disposed of the application of the 10th of July 1871 after the judgment-debtor's property was sold; but the effect of the subsequent order, dated the 14th of May 1873, by which the sale was set aside and the decree-holder directed to refund the money which he had withdrawn from the Court, was to nullify all the proceedings taken on the application of the 10th of July.

We think the facts of the case clearly come within the principle of the decision quoted by the learned Judge, and reported, 23 W. R., 183—*Booboo Pyaroo Tuhobildarinee* vs. *Syud Nazir Hossein;* although no doubt the facts are not exactly similar, but the principle upon which that decision proceeds is applicable. We think that, although in point of form, the petition of the 22nd of December 1874 was an application to execute the decree, in reality it was simply an application to the Court to continue the proceedings already commenced by the application of July 1871. In this view, it is clear that the application does not come within the provisions of section 167 of the Limitation Act. The application to execute the decree in this case is that of the 10th July 1871. It is not disputed that that application was within time. We think, therefore, that the decree-holder's right to execute the decree is not barred by limitation. We remand the case to the Moonsiff to proceed with the execution of the decree. The decree-holder is entitled to the costs of this appeal.

[CRIMINAL APPELLATE JURISDICTION.]

HARI SINGH AND OTHERS . . . . . APPELLANTS;

AND

THE EMPRESS OF INDIA . . . . . RESPONDENT.

1878
June 4th.

No. 235
of 1878.

Common Object—Unlawful Assembly—Prosecution of the Common Object—Penal Code, section 149—*Act XLV of* 1860, *section* 149.

If a body of men armed with *latties*, and under the leadership of one who to the knowledge of the rest is armed with a gun, assemble for the purpose of forcibly carrying off another man's property; and if, in effecting that purpose, any one of the party, taking the gun, shoots and kills a person who is making a lawful resistance, the whole party may properly be convicted of murder under section 149 of the Indian Penal Code.

The Queen vs. *Sabid Ali*, 20 W. R., Crim., 5, cited.

CRIMINAL APPEAL from an order passed by the Sessions Judge of Nuddea, convicting the appellants of murder under the provisions of section 149 of the Indian Penal Code. The facts of the case are sufficiently set forth in the following judgments, which were delivered by the High Court (1):—

MITTER, *J.*:— MITTER, *J.*

In this case the prisoners have been convicted of murder under the provisions of section 149 of the Indian Penal Code. The case for the prosecution was that these prisoners, with several others amounting to twenty or twenty-five persons, came armed with *latties* and *soorkies*, and one of them, viz., Tureeboollah, with a gun, to the field of Dowlut Fakir, the first witness for the prosecution, for the purpose of carrying away forcibly the paddy crops that were being reaped by Dowlut's son, Azim, assisted by others. Before they arrived on the spot, Azim had carried a bundle to his home which appears to be close by. Hearing of the approach of these men, he ran back with a *daô* in his hand. He met the assailants on the other side of a small stream which

(1) JACKSON, MITTER, and MACLEAN, *J.J.*

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MITTER, *J.*

divided them from his field. He threatened to attack with the *daô* any person who would come to his land. Upon this, Hari Singh, Tureeboollah, and several others, jumped over the *khal*, and got into the land, the crops of which were being reaped. Then, further altercation and interchange of abuse between the parties followed, whereupon Hari Singh took the gun from Tureeboollah and shot Azim Fakir dead. This is briefly the story of the prosecution.

On these allegations Hari Singh was charged with murder under section 302, and the other prisoners also with the same offence under section 149, as having been members of an unlawful assembly, in prosecution of the common object of which one of their members, viz., Hari Singh, committed murder.

Hari Singh has been acquitted of murder under section 302, but he and the others have been convicted of the same offence under section 149. Hari Singh has been acquitted of murder under section 302, because the Sessions Judge and the Assessors are of opinion that the story of the prosecution, as to the manner in which Azim was shot dead, is not credible.

It seems to me that the conviction of the prisoners of the offence of murder under section 149 is bad. The Court below unanimously held that Azim was not shot dead by Hari Singh. They do not find that any other known or unknown member or members of the unlawful assembly caused the death of Azim Fakir, under circumstances which would constitute the offence of murder as defined in the Code. Not only have they not found this fact, but there is no evidence on the record upon which they could find it. The only evidence that there is on the record showing the circumstances under which Azim Fakir was shot dead has been disbelieved. It seems to me that, upon this ground alone, the conviction of the appellants of the offence of murder under section 149 is unsustainable.

But, supposing that the Sessions Judge and Assessors were inclined to disbelieve the evidence of the prosecution, so far as it attempts to ascribe the death of Azim Fakir to the immediate act of Hari Singh, but that they accepted that evidence as to the manner in which he was shot dead, and supplemented it by an inference that the gun must have been fired by some one of the

member of the unlawful assembly, under circumstances which would constitute the offence of murder, still, I think, the prisoners should not have been found guilty of that offence under the provisions of section 149 of the Indian Penal Code. But, before I enter into that question, I may remark here that the Judge and the Assessors do not anywhere expressly find these facts; nor would this Court be justified in inferring them from the evidence recorded in this case. Are the circumstances established by the evidence of the prosecution, barring that portion of it which has been rejected by the lower Court, reasonably inconsistent with the supposition that the gun, from the firing of which Azim Fakir was killed, went off accidentally? The circumstances are equally consistent with that theory as with the case supposed by me above. However, even supposing all these facts against the appellants have been established, I do not think that section 149 supports their conviction of the offence of murder.

The section in question has received a careful consideration by a Full Bench of this Court in a case reported at page 5, of the 20th W. R., Criminal Rulings. Following the interpretation of this section by the majority of the Judges in that case, (which I am bound to follow,) I do not think that the offence of murder can be brought home to the appellants under its provisions.

According to the opinion of the majority of the Judges, the section in question is divided into two branches. The first branch refers to offences committed "in prosecution of the common object." The second branch deals with offences which the members of the unlawful assembly "knew to be likely to be committed in prosecution of that object." It has been almost conclusively shown in that case that the first branch does not include all the offences which any member, *during* the continuance of the unlawful assembly, might commit. It refers only to those offences which, in the language of Mr. Justice [illegible], are immediately connected with the common object of the assembly, or as Mr. Justice PONTIFEX has put it, which "necessarily flow from the prosecution of the common object." Thus for instance, where the common object of an

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unlawful assembly is to eject a particular person from a house in his possession, and if "in prosecution of that common object" one of the members enters into the house in order to drive the person in possession bodily out of it, all the members under this branch of the section would be guilty of the offences of criminal trespass and assault; because these offences are "immediately connected with" or "necessarily flow from the prosecution of the common object." But if that member, after entering into the house, wantonly destroys some of the furniture or carries them away, he alone would be guilty of mischief or theft, and the other members, under this branch of the section, cannot be convicted of those offences; because they are not immediately connected with, or do not necessarily flow from, the prosecution of the common object of the unlawful assembly.

Applying this part of the section to the facts of this case, I do not think that the conviction of the appellants of the offence of murder can be supported. Now, what was the common object of the unlawful assembly of which they were members? It was, as found by the lower Court, "not only to prevent Azim Fakir from reaping his paddy, but also to cut it and carry it off themselves." If murder was committed by one of the members of this assembly, I do not think it can be reasonably said that that offence was immediately connected with or necessarily flowed from the prosecution of the common object. If, in preventing Azim Fakir from reaping his paddy, he was put in wrongful restraint by one of the members, this would be an offence immediately connected with or necessarily flowing from the prosecution of the common object, viz., prevention of Azim Fakir from reaping his paddy; or if one of the members were to carry off a load of paddy and thereby commit theft, the other members might be found also guilty of the, because the commission of this offence would be immediately connected with or necessarily flowing from the other common object of the assembly, viz., to cut and carry away the paddy themselves. But it seems to me that the offence of murder, if committed by one of the members, cannot be reasonably held to be so connected with either of the common objects mentio

above, that it would render all the members guilty of the same offence under this branch of the section.

I now come to the other branch. The interpretation put upon it by Mr. Justice PONTIFEX is, that it refers to an offence which "must so probably flow from the prosecution of the common object that each member might antecedently expect it to happen." In this interpretation, the other two members of the Full Bench, who with him constituted the majority, virtually agree, although they express their view in different language. Suppose, in the illustration put by me above, the members of the unlawful assembly found that they could not encompass their common object, viz., the eviction of the person in possession of the house, because the gate of it was locked. Suppose that one of the members were to break open the lock, it would be an offence which would come within this branch of the section, because it so probably flowed from the prosecution of the common object, viz., eviction of the person in possession from the house, that each member might antecedently expect it to happen. But not the other offence of mischief or theft committed by one of the members by the destruction, or forcibly carrying off of any furniture in or from the house; because they do not so probably flow from the common object that each member might antecedently expect that this would happen. Can it be reasonably said in this case that the murder of Azim, supposing he has been murdered by one of the rioters, so probably flowed from the common objects of the assembly mentioned above, that each member might have antecedently expected it to have happened? I think not. It has been said that the rioters were armed with *latties*, and one of them with a gun, and that they knew that they would be resisted by Azim Fakir and his party; that these facts would, therefore, justify the inference that the members of the assembly knew that murder would probably be committed in prosecution of the object. With deference to my learned colleague who entertains this opinion, I must say that the facts mentioned above do not warrant this conclusion. Under these circumstances, it is not sufficient, for the purposes of this branch of the section, to say that we are satisfied, that the members knew that it was possible that murder might be committed during the continuance of the unlawful assembly; but we

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must be satisfied of this, that they knew that it was probable that murder would be committed in the accomplishment of the common object. The prisoners, with several others, amounting altogether in number to about sixteen or twenty persons, combined together and came in a body armed with *latties*, &c., to prevent Azim Fakir and his two friends from reaping his paddy, and to carry it off themselves. Under these circumstances, can it be reasonable that each member knew that it was probable that, in order to attain the aforesaid object, some one of them must cause the death of Azim Fakir, under circumstances which make him guilty of the offence of murder? I do not think that it would be reasonable to draw such an inference from these facts.

In order to determine whether the provisions of section 149 are applicable or not, each case must be dealt with upon its own facts and circumstances. But, curiously enough, there is an almost complete coincidence of facts and circumstances between this case and those of the Full Bench case referred to above. This circumstance is so clear that I think I may cite the opinion of the majority of the Court upon the effect of the evidence in that case in support of the conclusion to which I have come. In that case also the rioters were armed with *latties*, &c., and one of them, Tureeboollah, with a gun. The object of the rioters was to drive one Fakir Bun off a piece of land which he was ploughing. So far there is a complete coincidence of facts between the two cases. But, in that case, it was found that the unexpected resistance offered by two persons of the names of Shamed Ali and Shureef Ali, was the immediate cause of the firing of the gun by Tureeboollah which killed one of them. In this case, there is no finding of a fact analogous to this. In fact, the evidence in this case does not show what was the immediate necessity of the firing of the gun which killed Azim Fakir. Therefore, the only difference which exists between the facts of these two cases is a difference which goes in favour of the prisoners. Upon the facts of that case the majority of the Court held that they were not sufficient to establish the offence of murder under section 149 of the Indian Penal Code against each of the members of that unlawful assembly. The opinion of the majority of the Judges in that case, therefore, supports the view which I would take of the facts of this case.

I would, therefore, set aside the conviction of the appellants of murder under section 149, but it is clear that upon the evidence believed by the lower Court, they are guilty under the provisions of section 148 of rioting, armed with deadly weapons, and I would reduce the sentence to one of rigorous imprisonment for three years.

MACLEAN, J.:—

MACLEAN, J.

The only question raised before us is, whether the appellants, who have been convicted of murder committed by one of the members of an unlawful assembly, have been properly convicted by the application of section 149 of the Indian Penal Code to their case.

There were rival claims to some lands. Dowlut Fakir claimed to be tenant, and carried his claim successfully through all the Civil Courts. According to the Session's Judge, Hari Singh, one of the appellants and unsuccessful litigants, determined to prevent Dowlut Fakir from enjoying quiet possession; and he accordingly headed a party of armed men who proceeded with the object of seizing the crop which was on the land, and which Dowlut's son, Azim, had begun to reap. From the evidence it appears that Azim had gone home with some of the reaped crop, and that, hearing of the approach of the other party, he returned to his field armed with a *dao*, and threatened to kill or maim any one of them who interfered with his possession. There was an altercation, and Hari Singh and some of his party crossed a small stream and advanced upon Azim. Some one, the Judge and Assessors were unable to say who, fired a gun at Azim, and shot him dead from a distance of ten or eleven cubits.

The question is: Were all the party, one of whom fired the shot, guilty of murder by reason of their being unlawfully assembled, and by reason of the murder having been committed by one of them in prosecution of the common object of the assembly, or by reason of the murder being a likely incident in the prosecution of the common object within their knowledge?

It may be taken as true, and it certainly is not disputed, that the murder was committed in prosecution of the common object of the assembly. Hari Singh and his party intended to dispossess

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Azim Fakir of his crop, and, on his remonstrating, one of them killed him. The question is: Did they know that it was likely he would be killed? The reasonable conclusion is, that they knew it was likely they would meet with some resistance. Their numbers, and the various lethal weapons they took with them, show this. Then the evidence shews that, although Azim presented a bold and even threatening opposition to them, he was unsupported; and yet, without further provocation from him, he was forthwith shot before he had time to strike a blow in defence of his property.

I cannot bring myself to believe that a body of men, who go forth to dispossess another of his fields, most of whom carry lethal weapons, and one of them a gun, do not intend that the weapons shall be used if necessary; or do not know that, in all probability, the use of the weapons will be followed by their natural result. If a man is to be shot down on his own land, which he has defended through all the Civil Courts, by one of an armed band of men determined to turn him out, and then the assailants are to get off with a comparatively light sentence because they are not proved to have contemplated killing him, there will be no such thing as security for life in Backergunge. The Full Bench Ruling in 20 W. R., Cr. p. 5, certainly lays down that section 149 does not make it imperative on the Courts to hold all the members of an unlawful assembly guilty of an offence committed by one in prosecution of the common object of all; but it leaves the Courts at liberty to apply that section to each case according to its own circumstances. In the present case, I consider that the section should be applied, and I would affirm the conviction and sentence.

The Judges of the Division Bench having disagreed in their opinions, the case was then referred to Mr. Justice L. S. JACKSON, as third Judge, who delivered the following judgment:—

JACKSON, *J.*

JACKSON, *J.*:—

The Assessors, the Sessions Judge before whom the trial took place, and the learned Judges of this Court between whom the difference has arisen, all agree in the opinion that the appellants, without exception, were concerned and present in a ri

f the purpose was to restrain Dowlut Fakir and his from cutting the crops grown upon certain land, the intending to take the crops themselves; that the accused nd committed the riot, being armed with various deadly ıs, and one of the party, apparently one Tureeboollah efore the Court), carrying a gun; that the aggressors ithstood by Azim Fakir, the son of Dowlut; and that, sequel, Azim was killed on the spot by a discharge of this

not precisely found by whom, at a violent moment, ın was fired; and one of my learned colleagues would to have had it suggested to him that it may have ed by accident. In these circumstances, the question I am called upon to decide is: Whether the conviction of pellants under section 149 of the Indian Penal Code of fence of murder is sustainable?

ıppears that the right to cultivate the land in question had the subject of a long and closely-contested litigation be- Dowlut Fakir and Hari Singh, in which the former had successful throughout; and that, after this, the owner of ınd, being unfriendly to Dowlut, had let it to Hari Singh Tureeboollah, so as to unite the Hindoo and Mahomedan s against that of Dowlut; and, consequently, the riot in ı Azim was killed must be regarded as a deliberate attempt ɔtain by violence that which the law had declared to belong e party assailed. Acts of this description have been, and are, frequent in the district of Backergunge. Firearms are antly used, and death or severe wounding is a termination ɔ means uncommon.

the present case it is proved by the Native Doctor that een sixty and seventy slugs were extracted from the body of deceased, all having lodged between his forehead and his , that is to say, in the face, the throat, heart, lungs and ent parts. The slugs were large enough to break three ribs six teeth, and having scattered a little they afford proof that lischarge must have been at a short distance, with the gun ted at the upper part of the deceased man's body. In this of things, I am unable to arrive at any other con-

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clusion than that the person who held the gun fired it at Azim, and intended either to kill him or to cause such bodily injury as was likely, in the ordinary course of nature, to cause death, that is to say, that the person committed murder. It seems to have been argued before the Division Bench that the gun had gone off by accident. It would be going only a step further to contend that the weapon had exerted a will of its own, and emitted its contents in spite of the owner. But none of the accused made any such case: on the contrary, one of them, Komul Singh, distinctly said, on examination before the Magistrate, that either Hari Singh or Tureeboollah had fired the gun. I see that he used (in his Bengali statement) the English word "fire," which is well understood by natives. The witnesses for the prosecution, indeed, affirmed that, after crossing the *Khal* which separated them from the deceased, Hari Singh took the gun from Tureeboollah's hand and shot Azim dead. But the Court of Session had probably sufficient reason for refusing to accept this account as to the precise mode in which Azim had been killed. That murder, however, was committed by one or other of the assailants, appears to me not open to doubt.

The only questions, then, which remain are, whether the murder was immediately connected with, and necessarily or naturally flowing out of, the object of the unlawful assembly, and whether the case was such that those engaged knew that the commission of it was likely. It seems to me impossible to avoid the conclusion that both propositions are true. The contest as to the occupation of the land had been long and obstinate. The parties in possession were determined, and could not be expected to give way unless absolute violence was used. They were in the right and it was necessary to expel them by force. The attack was made by a large disorderly mob, of which one part might be unaware of what the rest was doing; it was a small compact body of (at the most) twenty or thirty men. That is the number stated by the prosecution, and there is always exaggeration in these matters. The gun was carried by Tureeboollah, who was the leader; and all would see and know that he carried it. They would, therefore, perfectly understand that the deadly use of firearm was among the probabilities of which they took the

in other words, that the commission of murder was likely to follow. 1878

I agree with Mr. Justice MACLEAN that, in such a case, to suffer the guilty persons to escape with slight punishment, by refusing to give the law its obvious meaning, would lead to mischievous consequences. In my opinion, therefore, the conviction was right, and the sentence perfectly proper, and, indeed, necessary.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF TROILOKHONATH BISWAS AND ANOTHER . . . . . } PETITIONERS.

April 30th.

No. 543 of 1877.

Judicial Proceeding—Investigation—Inquiry—Unnatural Death—Magistrate—Code of Criminal Procedure, sec. 135—*Act X of* 1872, *sec.* 135.

When, under the provisions of the Code of Criminal Procedure, section 135, a Joint Magistrate has held an inquiry and made a report to the Magistrate of the District, the High Court has no power to send for that report, as it forms no part of a judicial proceeding.

THIS is a case referred by the Sessions Judge of Nuddea to the High Court as a Court of Revision. The facts are thus stated in the Judge's letter :—

"Under section 296 of Act X of 1872, and Circular Order of the High Court, dated the 15th of July 1863, No. 18, I have the honor to transmit the record of the case of the *Empress* vs. *Troilokhonath Biswas*, to be laid before the High Court with the following reports :—

"One Ramgoti Biswas, on or about the 9th of June last, was found dead in a pond near the Lokenathpore Indigo Factory. Skrine, the Joint Magistrate of Chooadanga, held an inquiry into the matter, the result being that he discharged the persons whom he had ordered to be arrested, as he considered that the dead had committed suicide. Subsequently, the Magistrate of the district, Mr. Stevens, directed that Troilokhonath Biswas and Ramgoti Kahar, who had been examined by Mr. Skrine, should be prosecuted for giving false information to that officer. They were tried by Mr. Taylor, Joint Magistrate of

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Nuddea, and sentenced under section 182, to three months' rigorous imprisonment each. They appealed to this Court; and, when the cause came on for hearing, the Government Vakeel informed the Court that he had been instructed by the Magistrate of the district to say that he was unable to support the conviction, upon which I acquitted and discharged the prisoners.

"Shortly after this order had been passed, the prisoners' counsel, Mr. Munmohun Ghose, presented a petition on their behalf, praying that the record of the inquiry held by Mr. Skrine might be sent for and examined by this Court, on the ground that that officer's proceedings had been highly irregular; that the real cause of Ramgoti's death had not been ascertained; and that a further inquiry was urgently called for. A somewhat similar petition was presented on behalf of Ram Charan Biswas, the brother of the deceased.

"On the 4th of March, I directed the Magistrate of the district to send up the record. Not receiving it, I sent for it again on the 7th, when I was told the Magistrate was absent. On the 9th, I sent again, and, on the same day, I received a letter from the Magistrate, dated the 9th instant, copy of which I enclose, in which he declines to send the record on the ground that Mr. Skrine only held an inquest, that an inquest is not a judicial proceeding, and that, therefore, this Court has no authority, under section 295 of the Criminal Procedure Code, to call for and examine the record.

"It appears to me that the Magistrate is entirely wrong when he says that an inquiry under section 135 of the Criminal Procedure Code is not a judicial proceeding. That section empowers a Magistrate to hold an inquiry into the case of any unnatural death, and it provides that, when he holds such an inquiry, 'shall record the evidence taken upon it in any of the manner hereinafter prescribed.' Section 4 of the Criminal Procedure Code defines a judicial proceeding to be any proceeding in the course of which evidence is or may be taken, and this, by itself, appears to me to show that an inquiry by a Magistrate under section 135 is a judicial proceeding. The use of the word inquiry, too, appears to me to point to the same conclusion, as to mean judicial inquiry into a case which a Magistrate

not finally decide himself, the word being expressly distinguished by section 4 from an investigation, which is defined to be the proceedings of the police, and, consequently, executive, and not judicial.

"But apart from the general question whether every inquiry by a Magistrate under section 135 is a judicial proceeding, there can, I think, be no doubt that, in this particular case, Mr. Skrine's inquiry was a judicial proceeding. Mr. Skrine was examined by commission in the case instituted against Troilokhonath Biswas and Ramgoti Kahar; and, in his evidence, he states, that in consequence of statements made by them, he arrested the entire staff of the Lokenathpore Factory, with the exception of Mr. Glasscott and the Naib; and, in answer to a question subsequently put, he says that he released them on different dates, according as they succeeded in proving their innocence. Now, here we have a Magistrate holding an inquiry into an unnatural death, arresting persons suspected of having caused the death of the deceased, taking down their statements, examining witnesses on their behalf, and eventually releasing the persons who had been arrested; and if an inquiry of this nature conducted by a Magistrate is not a judicial proceeding, I am at a loss to know what it is to be called.

"It is said that Mr. Skrine did not examine the witnesses on oath or solemn affirmation. Without seeing the record I am unable to say whether he did so or not, as he does not appear to have been questioned on this point; but, if he did not, his having failed to comply with the provisions of the law laid down in sections 135 and 331 and the following sections, does not alter the nature of his inquiry and make it something different from a judicial proceeding. Neither does his having conducted the inquiry elsewhere than in his usual cutcherry have that effect. In reply to a question, Mr. Skrine in his evidence says, he did not examine anybody in open Court, the inquiry not being judicial; but section 187 of the Criminal Procedure Code says that any place in which a Magistrate holds his Court 'for the purpose of conducting an inquiry into a case triable by a Court of Session,'—evidently meaning such a case as the present,—

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shall be deemed an open Court; and if Mr. Skrine sat under a tree or in a ryot's house, and conducted the inquiry, such place was, for the time being, just as much a Court as the ordinary cutcherry would have been, and it is immaterial what Mr. Skrine may think proper to call it.

"If objections such as I have noticed were to be allowed to prevail, it appears to me that a Magistrate might, by contravening the provisions of the law, oust the Sessions Court of the jurisdiction given to it by section 295, and thus practice with impunity the very irregularities which that section was framed to counteract. Here is a man said to have been murdered; the Magistrate conducts an inquiry to ascertain whether he has been murdered, and, if so, by whom; arrests a number of persons who are suspected; keeps them under arrest; hears their defence; takes evidence on their behalf, and then releases them, saying the deceased had committed suicide; and when the relations of the deceased man come in and complain to this Court that there has been no proper inquiry at all, and that there has been a gross failure of justice, an attempt is made to stop further inquiry, so far as this Court is concerned, by an allegation that the proceedings taken were only executive, and that this Court has no jurisdiction to look into them.

"It is quite possible that Mr. Skrine's report may have been everything that could be desired, and that further inquiry is uncalled for; but, without seeing his report, it is impossible for me to say whether this is the case, and I think the executive authorities are very ill-advised in refusing to make public the result of Mr. Skrine's inquiry, and thus investing it with a kind of mysterious importance which it very probably does not deserve.

"The Magistrate of the district says he is ready to furnish me with the statements supplied to him by Mr. Skrine, by which, I presume, he means the depositions taken by him; but they would not enable me to form any opinion as to the legality of his orders or the regularity of his proceedings. There seems to be an objection to calling the depositions by their right name, lest doing so should favour the contention that the inquiry was a

judicial proceeding; but that the Magistrate did consider them formal legal depositions taken by a Magistrate in his judicial capacity, may, I think, be inferred from the fact of his having instructed the Government Pleader not to support the conviction of Troilokhonath and Ramgoti on the ground that those depositions had not been put in evidence.

"Mr. Stevens says that he cannot supply me with Mr. Skrine's report without the orders of Government; and that, if the petitioner, Ram Charan Biswas, applies to him for a copy, he will submit the application for the orders of Government; but I consider that this is a procedure which this Court is not called on to adopt, and that, when it has a right to order a Subordinate Court to send up a record, it should enforce that right without asking the permission of any one. The document, though it is called a report, is in fact Mr. Skrine's decision of the case, so far as he had authority to decide it, on the evidence recorded by him.

"The question, then, which I ask the High Court to decide is, whether the inquiry held by Mr. Skrine into the death of Ramgoti Biswas, was a judicial proceeding; and whether the Magistrate of the district is bound, under section 295 of the Code of Criminal Procedure, to send up the record of the case to this Court when desired to do so. If the High Court are of opinion that it is a judicial proceeding, and that the Magistrate is so bound, I request that they will compel the production of the record called for, to enable this Court to satisfy itself of the regularity of the Magistrate's proceedings as provided by section 295, or to call for the record and dispose of the whole case themselves, as shall seem most advisable to the Honourable Court. The four petitions presented to this Court by Troilokhonath Biswas, Ramgoti Kahar, and Ram Charan Biswas, accompany this reference."

The High Court sent for the record of the proceedings in the Court of the Sessions Judge, and issued a rule calling upon the Magistrate to show cause why an order should not issue directing the production of the report.

l, (Advocate-General,) showed cause.

M. Ghose, supported the rule.

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Judgment.

MARKBY, *J.*

The matter having been argued, the following judgment were delivered by the Court (1) :—

MARKBY, *J.* :—

The short facts of this case, so far as it is necessary to state them for the purpose of disposing of the present rule, are that, on the 10th of June 1877, a man named Ramgoti Biswas was found lying dead at no great distance from the factory of Lokenathpore. Under the circumstances in which he was found, I think that there was no possibility of doubt, or, at any rate, there was very good reason to suppose that the man had either committed suicide or had been murdered. It was, therefore, a proper case for the institution of an inquiry under section 135 of the Code of Criminal Procedure; and, accordingly, as we must take it now, the Magistrate of the Division proceeded to hold this inquiry. These proceedings lasted a considerable time, and, ultimately, they were communicated to the Magistrate of the district. The final conclusion to which the Magistrate who held this inquiry came was, that the man had committed suicide, and that he had purposely committed suicide under such circumstances as might raise a suspicion that the factory people, or some persons connected with the factory, had caused his death. Subsequently, some proceedings which arose out of this inquiry were taken against one of the petitioners now before us; and those proceedings went on appeal before the Sessions Judge of Nuddea. The Sessions Judge of Nuddea acquitted the petitioner, but he desired to see the proceedings taken under section 135, and he accordingly sent for those proceedings; but the Magistrate of the district, in whose hands they were at the time, thinking that the proceedings under section 135 were not judicial proceedings at all, declined to send them. The Sessions Judge of Nuddea reported the matter to this Court, and the Court, after having heard the Legal Remembrancer on the subject, came to the conclusion that the proceedings taken by Mr. Skrine, the Magistrate, who held the inquiry, were proceedings under section 135, and that they were judicial proceedings. The Judges did not, however, order the proceedings to be sent to

(1) MARKBY and PRINSEP, *J.J.*

Sessions Judge of Nuddea, but sent for those proceedings themselves, and an order was issued that the record of the proceedings under section 135 should be sent up to this Court. The Magistrate of Nuddea, in answer to that order, sent up certain papers; but he intimated at the same time that he was in possession of a report by Mr. Skrine, and he informed this Court that he did not send that report as that was written by Mr. Skrine as a confidential report to him.

In that stage of the proceedings, the case was transferred from the Bench which issued the original order to this Bench; and, as the matter then stood, the only point for our consideration was, whether or no the Magistrate of Nuddea was right in the view which he took, viz., that the report of Mr. Skrine did not form part of the proceedings under section 135. In the meantime, however, before we come to any conclusion upon that, the present application was made, specially requesting that we should send for this report, and that, after obtaining that report, we should quash it.

Now a good many questions would have to be considered before granting such an application. There may be some doubt whether Troilokhonath Biswas, (the only one of the petitioners who had ever been put upon his trial) having been acquitted, the petitioners had any *locus standi* at all. There may be considerable doubt, even putting all other questions out of the way, whether this Court would, at the instance of persons standing in the position of the petitioners, quash a finding under section 135; and there is still a further objection, taken by the Advocate-General, which is really not answered, viz., that as the inquiry under that section is optional, this Court has no power to order fresh proceedings to be taken; and there is therefore but little use in our interfering at all. But it is not necessary to go into these questions, for, on another ground, think that this application must fail.

The reason why, notwithstanding these objections, we thought desirable without further considering them that this rule should issue, was this: It was absolutely necessary for us, in the way the case came before us, to consider whether the Magistrate of Nuddea had duly complied with the order of this

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Court. The proceedings having been sent for, the report was not sent; and I understand, in the course taken by Mr. Stevens, that he wished to have it submitted, to the decision of this Court, whether or no he was bound to send up that report. I may say in passing that the course so taken by Mr. Stevens shows that he acted with perfect propriety in the matter. But it was necessary to decide the question which he submitted to us quite independently of the present application.

For my own part, also, I strongly desired to have the assistance of the advisers of the Crown in a discussion of this character. The question is of considerable importance, and one which may, in some cases, be of a very serious consequence, namely, whether the result of an inquiry under this 135th section is such, that, without the possibility of using any discretion in the matter, the Magistrate is bound to make it public. I, therefore, thought it desirable to issue a rule, in order to bring in the Crown, and have the question discussed. Accordingly, we issued a rule, in order to have the benefit of the argument of Counsel for the Crown upon the construction of this section.

The matter has now been argued, and we have to determine what is the true construction of this section. But, before I enter into that question, I wish to say one word as to what I understand to be the object of the petitioners in this case. I may say at once that, if there was the slightest indication that there was any intention of opening up a charge against any individual whatsoever by these proceedings, I would not have been a party for a single moment to any discussion in the matter. I would not, by issuing a rule, have given the least semblance of encouragement to such proceedings. But I fully understood Mr. Ghose from the first to represent, as he has also represented now, that that is not the object of these proceedings. I understand the real object of these proceedings to be to clear the memory of the deceased man from an imputation which has undoubtedly been cast upon him; whether we can arrive at that result under the law as it stands, is a different matter; but I am bound to say that I consider the object, if it can be attained by law, is a perfectly legitimate object. No one can doubt that it must be a matter of great pain to persons connected with this unfortunate

man, that this statement, viz., that he had committed suicide under such circumstances as the Magistrate supposes, should have been made. It may, no doubt, sometimes be the duty of public officers to make statements which are painful to others; but there is nothing objectionable, if persons affected by those statements try, by any legal means in their power, to get rid of those statements; and I go one step further,—I think that the relatives of this deceased person were not rash in their inference when they found a document of this kind printed and published; that it was intended to be put forth as the judicial result of a judicial enquiry. It commences thus:—"From F. H. Skrine, Esq., Officiating Joint Magistrate on special duty, to the Magistrate of Nuddea. I have the honour to submit a report embodying the results of my inquiry into the cause of the death of Ramgoti Biswas." and so on. Reasonably enough, the way in which it struck them was, that this was not merely an opinion of an individual formed upon the best materials that he could get together by any means in his power, and reported confidentially to his superior officer, but that it was an opinion of a judicial officer formed upon evidence, and in a judicial manner. Although they were misled in supposing that it was a document of this nature, I think that they were very reasonably justified in assuming that it was so, I may also say, that if this document had been of that character, and one, therefore, under our control, I should not have hesitated for a moment, if the law would allow me, in setting it aside. I think that it is of the utmost importance to keep a clear distinction between judicial and executive proceedings; and, if this report were before me as a judicial proceeding, I should feel bound to say that it was a very unsatisfactory one. I think that it is impossible to read this document, without seeing that this is not the result of an inquiry by Mr. Skrine himself, but of Mr. Skrine, assisted by a variety of persons of inferior position; that might be a most useful thing for an ulterior object, but would not be an inquiry which ought to be put forth to the world as a judicial proceeding by a Magistrate. I think it, therefore, right to say, that, if this had been a judicial proceeding, I should have treated it very differently from what I am now doing; and I hope, if it be once understood that this

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MARKBY, J.

is not a judicial proceeding, that it will be deprived of very much of its injurious effect.

Now, with regard to what is the more immediate subject for us now to consider, I am free to admit that, during the course of the argument, I have had some doubt as to what the intention of the Legislature was when introducing this section. I think it may be fairly argued that, *primâ facie*, when a Magistrate holds a judicial inquiry, and has power to take evidence, we should expect that it was intended that some result should be arrived at. But though that is so at first sight, I think, on further consideration, it is by no means clear,—even upon a general view of the Act, independently of the exact language of the section itself,—that that was the intention of the Legislature. The object of their inquiries may be three-fold. The object may be to calm any alarm that had been created in the mind of the public, on the occurrence of a violent or unnatural death, and to allay any unfounded suspicion; or the object may be to put in force the law against a particular individual; or it may be merely to gain information to be used by the authorities according to their discretion. Now, looking at the general character of this section and the sections which precede it, I cannot myself see that, merely for the purpose of putting the law in force against any particular individual, there was any necessity for this section at all. As far as I can see the powers of a Magistrate under the law, if he suspects any person of having committed any particular offence, are ample without having any recourse to this section; therefore, the inquiry, or inquest as it is sometimes called, must be to inform either the officers of Government or the public at large as to what has really occurred or is suspected to have occurred. Now, I am by no means prepared to say that, as a matter of policy, more would be gained than lost by the publication of the result of the inquiry. We may, no doubt, imagine cases in which it is very desirable that the result should be published; but we may also imagine cases in which it would be most injurious, even to private individuals, if the result were published. I only say this to show that I approach the consideration of the language of the section without being able to discern any strong reasons

policy in favour of either one construction or the other; and, therefore, though we may look to the policy of an Act as one of our guides in its construction, there is really nothing here to indicate what that policy is. The language of the section is this:—"The nearest Magistrate, duly authorized, may hold an inquiry into the cause of any such death, either instead of or in addition to the investigation held by the Police Officer; and, if he does so, he shall have all the powers in conducting it, which he would have in holding an inquiry into an offence, although no specific charge has been made against any person. The Magistrate holding such an inquiry shall record the evidence taken upon it in any of the manners hereinafter prescribed, according to the circumstances of the case." Now, Mr. Ghose argued that the language of the section at once pointed to the provisions of section 133, and that the inquiry held by the Magistrate was to be either supplemental to, or if he thought proper, substituted for, the inquiry held by a Police Officer, under section 133; and he quite rightly indicated to us that, under section 133, a report is required; for that section says, "that the Police Officer shall make an investigation and report the apparent cause of death," and so on. That argument, which struck me at first, seems to me to fail, because, whilst the Police Officer necessarily has some superior to whom he can report, it is by no means always so with the Magistrate. The Magistrate of the District, holding an inquiry under section 135, has, under the Code of Criminal Procedure, no executive superior to whom he can report at all. It is not impossible for him to report to the Judge, or to the Commissioner, or to Government; but I may say that it would be entirely out of the ordinary course of proceedings in this country, if he were, judicially and not executively, to make a report either to one or the other. At any rate, I feel sure that, if it had been intended that the Magistrate should report, judicially, either to the Sessions Judge, or to the Commissioner, or to Government, this would have been stated expressly in the Act.

Then, Mr. Ghose says, that, although the Magistrate is not bound to report, he must come to a finding. That, also, clearly was not the intention of the Legislature; because, under

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Judgment.

MARKBY, *J.*

section 133, although there is to be a report to the Magistrate, which is clearly not a finding, there is no person ordered to come to any finding at all. I can see nothing which gives any support to the argument, that, if there is not to be a report, there must still be a finding as distinguished from a report. The language of the section does not require a report, nor does it require a finding; and it seems to me that, if we were to say that under this section the Magistrate who holds an inquiry is bound to make a report or come to a finding, we should be making an unjustifiable addition to the language of the Legislature.

Some comparison has been made, between a Coroner's inquiry and the inquiry under section 135. As far as I can see, the only semblance of any basis for that comparison arises out of the word "inquest," which is used, not in section 135, but in the earlier sections, where the Legislature apportions the various duties of Magistrates. I think that we ought not to introduce an analogy which does not really exist. The proceedings of a Coroner are, in their nature, regular criminal proceedings, having a distinct result, and a result upon which, if it affects any particular person at all, ulterior proceedings can be taken against that person. I think, also, I am speaking correctly when I say that, even in some cases where no particular person was affected, still the result of the verdict of a Coroner's Jury might be to affect a forfeiture of property to the Crown. No doubt, some of these results do not exist now, and have fallen into disuse; but we must, I think, remember what the Coroner's Inquest originally was, when we are asked to consider why it results in a finding.

On the whole, therefore, I think that this rule ought to be discharged, upon the ground that the report sent up by Mr. Skrine to the Magistrate of Nuddea was not part of a judicial proceeding.

PRINSEP, *J.*

PRINSEP, *J.* :—

I altogether agree in the view of the law in section 135 of the Code of Criminal Procedure, which has just been laid down by Mr. Justice MARKBY, and in holding that the report sub-

mitted by Mr. Skrine, the Magistrate of the Division of Chooadanga, to the District Magistrate, Mr. Stevens, is no part of any judicial proceedings held under that section. It seems to me quite clear that the form of an inquiry under section 135 is directed more to elucidate the facts of a violent or unnatural death, before there is any reasonable suspicion of the commission of any offence; and that, when such grounds do exist, the enquiry comes under another portion of the Code.

As regards the form in which the present application is made to us, I must say that I have always entertained serious doubts as to the *locus standi* of the petitioners, and it was, as has already been stated in the judgment which has been just delivered, on account of the importance of deciding the position of the Magistrate, with regard to this particular report and the proceedings taken by him, that led me to agree in the course taken.

Whatever grounds the relations of the deceased may have to complain of the terms of the report, in the form in which they produce it before us, and the aspersions that it may cast on the memory of the deceased Ramgoti Biswas, I think that the observations of the learned Advocate-General, in the course of his argument, completely dispose of any objection that they may take to the terms in which that report mentions Ramgoti. That report was never published until, through some injudicious agitations of the friends or advisers of the petitioners, a pressure was brought to bear on the Government, which induced the latter to consent to the publication of that report in the expurgated form in which it has been laid before us. Had this course not been taken on behalf of the petitioners, that report would never have been published or been made known, except to the officials immediately concerned. We have no power to quash that report, as we are asked to do; nor has it been suggested that any good result would ensue in the ends of justice, by any re-opening of the inquiry; since it is admitted, that nothing is forthcoming or likely to be elicited which would throw any fresh light on the circumstances attending the death of Ramgoti Biswas.

[CRIMINAL REVISIONAL JURISDICTION.]

1878
May 27th.

IN THE MATTER OF UMDA KHANUM AND OTHERS.

Section 491, Code of Criminal Procedure—Security to keep the peace—Evidence to be recorded.

A Magistrate is not competent to require persons to give security to keep the peace until he has adjudicated, on evidence taken in their presence, that they have by their conduct rendered this necessary.

Rajah Run Bahadoor Singh vs. *Ranee Tilessuree Kooer*, 22 W. R., Crim., 79, cited and followed.

APPLICATION to the High Court, as a Court of Revision, to set aside, as contrary to law, the order of the Joint Magistrate of Nowada, requiring Umda Khanum, a *purdah* lady, to give security to keep the peace.

The Joint Magistrate tried certain persons on a charge of riot and severe assault, but having "grave doubts as to their guilt" discharged them; but, at the same time, and without taking any evidence, required one of those persons as well as the witness of the complainant and others who appeared for the complainant to give security to keep the peace.

Mr. *C. Gregory* for Petitioner.

The following order was passed by the High Court (1):—

The Joint Magistrate of Nowada, who has required the petitioner, a *purdah* lady, and others, to furnish security to keep the peace, admits that he has passed this order without the special recording of evidence, as he considers that the law only requires that a Magistrate shall decide on sworn testimony sufficient to convince him of the necessity of the proposed procedure, and he proceeds to state that in another case he "had abundance of such evidence," and that "being in camp for six days in the village, I can speak to the bitter exasperation of the parties."

The terms of the law are clear against the Joint Magistrate. A Magistrate must have a report or information which appears

(1) MARKBY and PRINSEP, *J.J.*

to be credible, and which he believes, before he can issue a summons, calling on any person to show cause why he should not be bound over to keep the peace; but he cannot bind over a person until he has adjudicated on evidence before him, that is, upon evidence taken in the regular way in the presence of the person who is to be bound over that person. (Explanation I, section 491.) That evidence may be the submission of the person summoned to the terms and conditions of the summons; or, should he not so submit, evidence establishing that a breach of the peace is likely to take place in consequence of the unlawful conduct of such person.

If, however, any person has been convicted of an offence attended with violence, of the nature specified in section 459, the Magistrate is competent, in addition to the sentence or order passed, to direct that the person so convicted shall give security. In such a case, too, the Magistrate has adjudicated on evidence before him (that is, the person concerned) that facts are established requiring security, because he has convicted such person of a breach of the peace or an intention to commit a breach of the peace. In the case, however, on which the Magistrate relies as an alternative, should his view of the law be erroneous, only one of those now bound over were accused, and he is not the petitioner. Further the Magistrate distinctly acquitted in that case, so that that evidence is not admissible even against Gujadhur Lall.

We commend the Joint Magistrate's attentio[redacted]e judgment of the Court, reported in 22 W. R., Crim., 79—*Rajah Run Bahadoor Singh* vs. *Ranee Tilessuree Kooer*, in which we generally agree and which is in point. Security to keep the peace having been taken by the Magistrate without adjudicating on evidence recorded before these persons, we cancel that order, not only as regards Umda Khanum, but as regards all those concerned in that proceeding.

[CIVIL APPELLATE JURISDICTION.]

1878 June 24th.

No. 108 of 1877.

RAJA LUCHMUN PERSHAD GORGO . . . PLAINTIFF;

AND

LUKHUN CHURN KUR . . . . . DEFENDANT.

Construction of contract—Measurement of Land—Landlord and Tenant—Kabuliut—Agreement to measure.

A granted a lease of certain land to B at a certain rate per beegah. It was agreed that the quantity of land should be taken as 7,000 beegahs until measurement, and that when measured the total rent should be increased or diminished according as the quantity of land was more or less than 7,000 beegahs. Subsequently, in a suit between A and B, in which the quantity of land was not a material issue, the land was measured at A's instance and found to contain 9,000 beegahs. *Held*, in a subsequent suit for the increased rent, that that was not such a measurement as was contemplated by the parties; and that A could not bring a suit on the agreement on the basis of that measurement.

Ekram Mundle vs. *Hullodhur Pal*, I. L. R., 3 Cal., 271; cited and followed.

REGULAR APPEAL from a decision passed by the Subordinate Judge of Midnapore. The facts of the case are these: The defendant applied to the plaintiff for a lease of certain lands in his zemindari, and the plaintiff gave him an amalnama, the material portion of which is as follows:—" You made an application to my Sudder Cutcherry at Garh Kamalpur, praying to take a moeurrari jumma by fixing the annual rent of Re. 1-2 per beegah of all the *Jalpayi* lands appertaining to the salt manufactory of Pergunnah Aranganagar, of which a pottah has been obtained from Government, with the Chara, Meda, Jushi, Khal, Jungle and lands in and out of cultivation, estimated to be 7,000 beegahs of land. Having accepted your petition, I, taking a kabuliut from you for the present, grant you an amalnama for the purpose of cultivation and residence of about 7,000 beegahs land on condition of (granting) a perpetual settlement of all said *Jalpayi* land, that after beginning the cultivation of said 7,000 beegahs of land, you will continue to pay (rent) at

progressive rate of four annas per beegah in 1272, of 9 annas per beegah in 1273, and of 14 annas per beegah in 1274, and at the full rate of Re. 1-2 per beegah in 1275. For the present a settlement is made according to this amalnama. Afterwards the lands thus settled will be measured in ensuing Aughran, and for all the excess land that will be found on measurement, you will pay rent at the said progressive and full rates; for any deficiency that may be found in the quantity of land, a deduction will be allowed. After the measurement is completed, you will take a pottah and grant a kabuliut engrossed on stamps of proper value. If you do not, this settlement, made with you, shall be cancelled, and another settlement made with others. You or your heirs shall have no objection thereto."

On the same day, namely, the 4th of July 1865, the defendant granted a kabuliut, according to the terms of the amalnama, but with the exception that there was no mention of the time at which the measurement was to be made.

Subsequently one Lall Mohun Barik brought a suit against the present defendant, alleging that part of the lands of which the latter was in possession, belonged to him, and on the 12th of February 1873, he got a decree for mesne profits, having previously obtained a decree for possession of 692 beegahs of land. On the 13th of February 1874, the present defendant, Lukhun Churn Kur, filed a suit against the present plaintiff, Raja Luchmun Pershad Gorgo, for a refund of the rent paid on account of the 692 beegahs, but the suit was dismissed. In that suit the lands covered by the kabuliut were measured by the Civil Court Ameen at the instance of Raja Luchmun Pershad Gorgo, and were found to contain upwards of 9,000 beegahs. Subsequently, Raja Luchmun Pershad Gorgo brought the present suit, on the 12th of June 1876, alleging that having been found that the defendant had 9,000 beegahs of land in his possession, plaintiff, on the 29th of May 1875, served a notice on the defendant demanding a kabuliut from him; that the defendant had failed to grant it; and claiming to recover rent from the defendant on the basis of the 9,000 beegahs, according to the original agreement. The defendant denied service of notice; pleaded limitation, and that the measurement was not

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Judgment.

made in the manner agreed on between the parties, not h been made according to the standard pole of the district with chain and compass. The lower Court held that, s suit was brought on the basis of the amalnama and ka of the 4th of July 1865, the measurement had not place in accordance with the intention of the parties to agreement, and he dismissed the suit. Plaintiff appealed High Court.

Baboo *Unnoda Prosad Banerjee*, for Appellant.
Baboo *Hem Chunder Banerjee*, for Respondent.

The judgment of the Court (1) was delivered by

GARTH, *C.J.*

GARTH, *C.J.*:—

We think that the Subordinate Judge was perfectly rig the conclusion at which he arrived.

This is not a suit for enhancement of rent under the Rent It is a suit for the purpose of recovering an enhanced rent the terms of the defendants' kabuliut.

Reading the kabuliut and the amalnama together, the of the arrangement, which was come to between the p in the settlement in question, were that the defendant s take an area of land, which was estimated to contain 7,000 be at a rent commencing at 4 annas, and eventually reachin 1-2 per beegah. It was arranged that, in the month of Au following, a measurement of the land should take place, an if, upon that measurement, the area of the land should be to be larger than 7,000 beegahs, the defendant was to p additional rent in proportion; but if it should be smalle rent was to be proportionally abated. And then there was a fresh pottah and kabuliut executed between the p according to the result of such measurement, and if such liut were not given by the defendant, the landlord was to liberty to re-settle the land with other persons.

We are not prepared to say that the Judge was wr deciding that this measurement was to take place in the

(1) GARTH, *C.J.*, and MCDONELL, *J.*

of Aughran, and not at any other time. But even supposing he were wrong in that, and that the appellants' argument were correct that there might, by the conduct of the parties, be a waiver of the time at which the measurement was to take place, still the question would remain whether, before bringing this suit, any such measurement had been made as was contemplated by the parties.

The measurement upon which the plaintiff relies was made under these circumstances: The present defendant had brought a suit against him for a refund of an excess amount of rent paid to the present plaintiff. The plaintiff in that suit alleged that he had been dispossessed of some 692 out of the 7,000 beegahs in a suit brought against him by some third party. He therefore claimed a refund of the rent which he had paid to that extent. In that suit an Ameen was deputed to survey the land, and he made a measurement of it for the purpose of the suit, but the question in that suit was not, whether the land exceeded 7,000 beegahs, and if so, by how much, but whether the then plaintiff's allegation was correct that he had been dispossessed of 692 beegahs of his land.

The plaintiff now says that the Ameen found, (according to the measurement which he then made,) that the real area of the land, instead of being 7,000 beegahs, was upwards of 9,000 beegahs; and it is upon that finding of the Ameen that the plaintiff has brought this present suit, without any notice being given to the defendant to have a regular measurement made, as provided by the kabuliut.

Upon this point, the case of *Ekram Mundle* vs. *Hullodhur Pal*, in the 3rd volume of the Indian Law Reports, Calcutta Series, page 271, is a direct authority. That was a case in which the plaintiff brought a suit against the defendant for enhanced rent under a provision in the kabuliut similar to the present. In that case there had been a former suit brought against the defendant for the agreed rent, and the defendant pleaded that the land was less than the estimated quantity. An Ameen was, therefore, ordered to measure the land for the purpose of ascertaining whether the defendant's plea was well founded, that the land was less in quantity than the estimated area, and the Ameen found

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GARTH, C.J.

that, so far from being less, it was more, and upon that measurement the plaintiff (the landlord) brought his suit, contending that the measurement in the former suit was made in the presence of both parties, and that both parties were bound by it. But this Court held that there had been no measurement at all within the meaning of the agreement. The measurement which had been made was not binding upon both parties, and the question of excess land was not in issue in the suit. The finding of the Court as regards the excess was immaterial to the purposes of the suit; and if the defendant had wished to appeal against the judgment, upon the ground that the finding as regards the excess was incorrect, he could not have done so.

Precisely the same reasoning will apply to this case. Here the measurement was made in the former suit with an entirely different object than to ascertain whether there was any excess quantity of land beyond the 7,000 beegahs. It was to determine whether the case which the then plaintiff (the present defendant) set up was correct; and, although the measurement may have shown that the quantity was upwards of 9,000 beegahs, that was not a matter material to the suit, nor one against which the plaintiff in the suit could have appealed if he had wished to do so.

The measurement intended by this agreement was one b which both parties were to be bound—a measurement which w to be made not only in the presence of both parties, but by person or persons to be appointed by them both, and in resp of which a new agreement of tenancy, in the event of the a being greater or less than 7,000 beegahs, was to be entered in

In fact, this contention was virtually given up in the argu of the Government pleader, because he admitted that the mer measurement was not so binding upon both parties as the defendant was precluded in this suit from bringing fo evidence to contest its correctness.

We think, therefore, that upon this ground alone the pla suit must be dismissed, and we accordingly dismiss this with costs.

[CIVIL APPELLATE JURISDICTION.]

BROJO COOMAR SEN . . . . . PLAINTIFF;

AND

ISHAN CHUNDER DAS AND ANOTHER . . DEFENDANTS.

1878 *June 27th.*

No. 374 of 1877.

*Jurisdiction—Valuation—*Ad Valorem *Duty—Stamp Duty—Appellate Court —Court Fees' Act VII of* 1870, *section* 12, *cl.* 2.

Where a Moonsiff ruled erroneously that a suit instituted in his Court had been correctly valued, and it appeared that, if the suit had been correctly valued, the Moonsiff would not have had jurisdiction to entertain it, the lower Appellate Court, having regard to clause 2, section 12 of the Court Fees' Act VII of 1870, ordered that the appeal should be decreed, the plaint retained until the plaintiff should pay the additional stamp duty, when the suit would be made over to the Subordinate Judge for retrial. *Held*, that the order was a proper one.

SPECIAL APPEAL from a decree passed by the Additional Judge of Chittagong, reversing that of the Sudder Moonsiff of that District.

The suit was for damages for breach of contract. In that the defendants having agreed to give every year 300 arrees of Paddy and 60 rupees to the plaintiff in consideration that the plaintiff should marry the first defendant's daughter, the marriage took place, but the defendants refused to carry out their part of the agreement.

The defendants objected that the suit was improperly valued, but the Moonsiff overruled the objection and decreed the claim on the merits. On appeal, the Judge held that the suit was improperly valued; that it came within the class of suits mentioned in clause 2, section 7 of the Court Fees' Act VII of 1870; and he passed an order "to decree this appeal, and to detain the plaint in this Court for a period of two months, by which the plaintiff will pay in the additional stamp calculated on the whole value of the claim, when the case will be made over to the Subordinate Judge."

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Judgment.

The plaintiff appealed specially, on the ground "that the le Judge has erred in law in interfering with the decision of the Court on the question of valuation when the said decisi final under the law. The power of the Appellate Court clause 2, section 12 of Act VII of 1870, being confined t levy of stamp duty on the valuation made by the Court of Instance in cases where that duty has been wrongly imposed

Baboo *Auldil Chunder Sen*, for Appellant.
Baboo *Bhugobutty Churn Dutt*, for Respondent.

The following judgments were delivered by the Court (1) :-

MITTER, J. MITTER, J. :—

We do not think it necessary to determine the que whether the lower Appellate Court, under the Court Fees' had power to consider whether the stamp duty paid on plaint was sufficient or not. It is quite clear that the Di Judge had power to consider the question whether the sui properly brought in the Moonsiff's Court, or, in other w whether the Moonsiff had jurisdiction to entertain it. evident that the Moonsiff had no jurisdiction to entertai suit. We do not think that we ought to interfere with the passed by that Court, and we dismiss the appeal with costs.

MACLEAN, J. MACLEAN, J. :—

I am of opinion that the decision of the Moonsiff as to was the value of the subject-matter in dispute was not fin the purpose of determining the question of jurisdiction, alth it may have been so for the purpose of stamp duty. It has ruled that these two matters are perfectly distinct, and I t fore concur in thinking that the District Judge had pow decide the question of jurisdiction, and his decision is co I concur in dismissing this appeal with costs.

(1) MITTER and MACLEAN, J.J.

[CRIMINAL APPELLATE JURISDICTION.]

ABDOOL KURREEM. . . . . APPELLANT;

AND

THE EMPRESS OF INDIA. . . . . RESPONDENT.

1878
July 19th.

No. 379 of 1878.

Abetment—Conspiracy—Bigamy—Penal Code, sections 109, 495.

The elder paternal uncle of a Mahomedan girl, a minor, disposed of her in marriage, after he knew she had previously been given in lawful marriage by his younger brother. *Held*, that the act did not, *per se*, constitute a criminal offence, even though the second marriage were valid, it appearing that the accused was the only person concerned in the second marriage who knew of the first, and that the girl was not present.

A and B were indicted under sections 109 and 495 of the Penal Code—A for giving his niece (a minor) in marriage, she being then married, and B for aiding therein. The girl was not present at the marriage, and there was no evidence to show A had conspired with any person but B, whom the jury acquitted: *Held*, that the acquittal of B involved the acquittal of A.

CRIMINAL APPEAL, from a finding and sentence passed on the appellant under sections 109 and 495 of the Code of Criminal Procedure.

Wood, for the Appellant, (Moonshee *Serajul Islam*, with him.)

The facts of the case are sufficiently set forth in the following judgments which were delivered by the High Court (1) :—

WHITE, *J.*:— WHITE, *J.*

The prisoner has been convicted under section 494, coupled with section 109, of abetting the offence of bigamy. This word is not used in the 494th section, but it briefly describes the offence contemplated by that section. The charge of abetment is preferred against the prisoner, jointly with his brother Soban, but the latter has been acquitted.

(1) WHITE and PRINSEP, *J.J.*

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Judgment.

WHITE, *J.*

It appears that one Abdool Rohim died a short time ago, leaving a widow and an only daughter, an infant, named Hoorunnessa. The prisoner is the elder brother of Abdoos Soban, and the two are the paternal uncles of Hoorunnessa, and as such are by Mahomedan law her guardians in marriage during her minority.

According to the prosecution, Hoorunnessa, who is about six years old, has, since her father's death, been the subject of three marriage ceremonies, which took place within a short interval of time between each. First, the mother of the girl disposed of her in marriage to one Abdool Hossein, a boy about 12 years' old. This marriage is admitted by the prosecution to be invalid, inasmuch as the mother was not the guardian of the child for the purpose of marrying her. A second ceremony is alleged to have subsequently taken place, in which Abdoos Soban, the younger paternal uncle of the girl, in the absence of the prisoner, Abdool Kurreem, gave her in marriage to the same Abdool Hossein. By means of this second ceremony, although solemnized by the younger uncle alone, a valid marriage was, according to the prosecution, made between Abdool Hossein and the girl. Afterwards, a third ceremony took place in which the prisoner Abdool Kurreem, the elder paternal uncle, gave the child in marriage to one Daburuddin, a boy nine years' old. It is in respect of this third ceremony that the charge of abetment of bigamy was preferred against both the uncles. The prosecution alleged that both of them were present at the third ceremony—Abdool Kurreem as the principal actor and Abdoos Soban as a consenting party; and that when the third ceremony was performed, Abdool Kurreem was aware that the second ceremony had been performed; and that Abdoos Soban, as being the principal actor in the second ceremony, had necessarily a similar knowledge.

The defence of Abdoos Soban was, that he took no part either in the second or third ceremony, nor was present at either. The defence of the prisoner Abdool Kurreem was, that he knew nothing about the alleged performance of the second ceremony, and that he was merely exercising his lawful rights as guardian in giving the child in marriage to Daburuddin. The Session

Court and the Assessors have found as regards Abdoos Soban that he was present at, and did take part in, the second ceremony, and that the second ceremony constituted a valid marriage, but that he was not present at the third ceremony, nor party to the same, and accordingly have acquitted him. As regards the prisoner Abdool Kurreem, they find that he gave away the child at the third ceremony; that it was a void proceeding in consequence of the previous second ceremony; and that the prisoner was, at the time of the third ceremony, aware that the second ceremony had been performed, and they accordingly convicted the prisoner, and he was sentenced to 18 months' rigorous imprisonment.

The prisoner before us has appealed against the finding of the Sessions Court on the facts, and also against its conclusions in law. It appears to me unnecessary to enter into the merits of of the appeal: for taking the facts as found by the Court to be true, and the law applied by it to be correct, I am of opinion that this conviction cannot be sustained.

The prisoner is charged with the abetment of an offence under section 494 of the Penal Code. To establish a charge of abetment under the Penal Code, the accused must be proved either to have instigated or aided some other person to commit the offence or to have engaged with another in a conspiracy for the commission of the offence. The acquittal of Abdoos Soban, who was jointly charged with the prisoner, puts an end to the case of conspiracy; for, except with Abdoos Soban, there is no evidence to support a case of conspiracy. If, therefore, the conviction can be upheld, it must be in consequence of the prisoner having instigated or aided Hoorunnessa to contract a second marriage. The evidence shows that Hoorunnessa took no part in, nor was present at, the ceremony which the prisoner caused to be performed in her name, and there is not only no proof of instigation or aiding, but not even the slightest evidence that Hoorunnessa was consulted, or even communicated with by the prisoner before the ceremony took place. In fact, the nature of the transaction almost precludes the notion of abetment as far as the infant girl is concerned. The prisoner purported to dispose of her in marriage, not by virtue of any authority

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WHITE, J.

derived from her, or from any consultation of her wishes, but by virtue of his legal position as elder paternal uncle. The girl was a mere cypher in the transaction. Her name was used, the ceremony was on her behalf, and the prisoner symbolically gave her in marriage to Daburuddin, but the girl was personally a stranger to the whole proceeding; although the effect of the ceremony would have been, supposing the prisoner was acting within the authority given him by law, to bind the infant by the marriage so contracted, yet she was not the less personally a a stranger to both the ceremony and the contract.

It appears to me, therefore, that, without determining any of the questions of fact or law raised by the prisoner's appeal, the conviction must be set aside on the ground that the prosecution has failed to show that the prisoner is guilty of the offence of abetment within the meaning of the Penal Code. Assuming the facts and law to be as found and laid down by the Sessions Court, the prisoner has committed an illegal act in disposing of his infant ward in marriage after he knew that she had been previously lawfully disposed of in marriage by her younger paternal uncle, but in doing this act he was, according to the evidence, the sole actor, and the act, though illegal, is not, if done by one person alone, an offence provided for by the Penal Code.

In disposing of this case, I would observe that it ought not to have been made the subject of a criminal prosecution. A dispute has evidently arisen between the relatives of this little girl, who appears to be entitled to some property, as to which of them should dispose of her in marriage. The several questions which the dispute has given rise to, viz., what marriage ceremonies have been performed on the girl's behalf, and by whom, and what is their legal effect, are eminently questions to be submitted to a civil tribunal, if the parties disagree about the same; and it is much to be deprecated that one of the rival parties should endeavour to procure a decision on these points through the medium of a criminal trial. The inconvenience and hardship to the accused of making such a dispute the subject of a criminal prosecution is well illustrated by the present case. The first marriage which the mother solemnized is admitted by the prosecution to be wholly invalid. To show that the third marriage

solemnized by the prisoner was invalid, it is essential for the prosecution to establish that an intermediate ceremony took place in which Abdoos Soban disposed of the girl in marriage, and that that intermediate ceremony constituted a valid marriage according to Mahomedan law. Although the evidence of Abdoos Soban is of the utmost importance on this question, the prosecution has chosen to put him on his trial jointly with the prisoner, and so prevented him from being called as a witness. Abdoos Soban denies that he did solemnize the second marriage, and this cardinal point has been determined by the Criminal Court without hearing his testimony.

Another objection to the course adopted in the present case is, that the criminal trial will not be a bar to the taking of civil proceedings at some future time in order to ascertain to which of the two boys the girl was legally married; and, should such proceedings take place, the conviction of the prisoner in the criminal trial will be no evidence against him in the civil proceedings. The whole matter will have to be re-investigated upon such evidence as the parties may adduce, and it is possible that the Civil Court may arrive at a conclusion different from that of the Criminal Court and uphold the marriage, for contracting which the prisoner has been found guilty. The conviction and sentence will be set aside and the prisoner released.

PRINSEP, J.

PRINSEP, J. :—

I altogether agree with my learned colleague that in this case it is not necessary to come to any finding upon the facts, and that, accepting the facts as stated by the prosecution, the appellant cannot be convicted of the abetment of bigamy under sections 109 and 494 of the Indian Penal Code.

The girl Hoorunnessa, who forms the subject of this case, is aged about six years, and apparently is possessed of considerable property, which fully accounts for the strife which is going on for her person and for procuring her marriage into one or other of the two families. She was married first to Abdool Hossein, with the consent of her mother; but this was not a proper consent such as would render the marriage valid. She was afterwards, according to the prosecution, again married to the

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Judgment.

PRINSEP, J.

same boy, Abdool Hossein, with the consent of Abdoos Sob her younger paternal uncle, that is, one of her two guardia Then the prosecution goes on to say that she has been marr for the third time (so as to cause bigamy) with the consent at the instigation of the appellant, Abdool Kurreem, the el uncle, to another boy. Now the first marriage is admitte void; and, if the facts are as stated by the prosecution, the th marriage would also be void as being a bigamous marriage. however that may be, as has been forcibly pointed out, t matter should be decided and can only be properly decided in Civil Court. Even if the appellant, Abdool Kurreem, did proc that marriage, he cannot, on the facts stated by the prosecuti be rightly convicted of the abetment of bigamy. It does appear, nor is it stated, that the girl was present or even cogniz that this marriage was to be contracted on her behalf. offence of abetment and its definition is to be found in sect 107 of the Indian Penal Code, and that section is supplemen by a definition of the term "abettor" in section 108; but b these sections contemplate either the instigation or the aiding some person to commit a substantive offence, or the engaging the conspiracy on the part of a person in the position of appellant, with one or more other persons. It has been poin out by Mr. Justice WHITE, that there must be either a princ committing a particular act or instigating to commit that act, there must be some other person engaged with the appellant abetting this act, to constitute an abetment under the Ind Penal Code. But nothing of the kind is alleged by the prose tion; and therefore, even if the appellant should have commit all the acts imputed to him, he would not be guilty of any cri nal offence under the Indian Penal Code. The conviction wil set aside and the prisoner released.

[CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF ACHARJEE LALL AND ANOTHER . . . . . } PETITIONERS.

1878 *August* 13*th*.

No. 129 of 1878.

Inquiry—Agent—Information—Dewan—Kazanchi—Code of Criminal Procedure, sections 90, 206—*Offence.*

In an inquiry, such as is contemplated by section 206 of the Code of Criminal Procedure, it is necessary that the accused should have a clear statement made to him : (1) That he is about to be put upon his trial ; and (2) What the offence is of which he is charged.

Quære.—Whether a *Dewan* or a *Kazanchi* is an agent within the meaning of section 90 of the Code of Criminal Procedure ; and, if so, whether he is bound to give any information except in the case of a sudden or unnatural death.

MOTION on behalf of Acharjee Lall and another, that the High Court should quash a finding and sentence of the Deputy Magistrate of Sarun on the ground of illegality.

Branson and *Evans*, for the Petitioners. (Baboo *Doorga Pershad*, with them.)

Kilby, for the Prosecution.

The judgment of the High Court (1) is as follows :—

MARKBY, *J.* :— MARKBY, *J.*

It is clear that the conviction of these two petitioners must be set aside as illegal. It is not necessary to enter into any minute consideration of the rules laid down in the Code of Criminal Procedure, because, at any rate, it was necessary, before these two persons could be convicted, that they should fully understand that they were upon their trial for an offence, and what the nature of that offence was.

Now the contrivance by which the petitioners were brought before the Magistrate was in itself an extremely unsatisfactory proceeding, wholly unworthy of those who devised it and of

(1) MARKBY and PRINSEP, *J.J.*

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MARKBY, *J.*

those who carried it out. A notice was sent to these two persons by the District Superintendent of Police, informing them that, with reference to the charge of theft of barley of one Gokul Tewari and others, it was necessary to ascertain from them certain facts, and they were therefore written to in order that they should attend at the camp of the District Superintendent of Police on the next day at 8 A.M. That notice is dated the 13th of March 1878. That was not a legal summons which the petitioners were bound to obey, but it is one which, out of good feeling and respect, would be almost universally obeyed, coming from a European officer to persons in the position of the petitioners. The petitioners, accordingly, went next morning to the spot indicated; and the first thing that happened when they got there was, that they were put into custody. This was wholly illegal and most improper. It does not even appear that they were informed for what reason they were placed in custody.

Then certain proceedings took place which it is extremely difficult to understand. A man named Redoy was then and there actually tried and convicted of theft. But, besides that, these two petitioners were also tried and convicted for not giving information to the nearest Police Station of the offence of theft, as required by section 90 of the Criminal Procedure Code. But it is very uncertain in what order those proceedings took place. They seem to have been, to some extent, mixed up together. The probability, however, is, that in the first instance some evidence was taken against these two petitioners, but before that case was concluded, the case against Redoy was gone into, and he was convicted; and then, subsequently, more evidence was taken for or against the petitioners, and they were also convicted by the Joint Magistrate.

The proceedings appear to have taken place at the camp of the District Superintendent of Police, and not in any cutcherry. Of course, the circumstances under which this trial took place were such as to render it extremely likely that the two petitioners would not really understand what was going on. They accordingly complained, when they came in appeal before the Judge, that they did not understand the proceedings. Especially

ıplained that they received no summons; that there rmal complaint made against them; and that they did :stand the charge upon which they had been put upon l.

.dge upon that asked for an explanation from the Joint te. The Judge in his letter pointed out that, unless t Magistrate had special power to proceed without :, the absence of the complaint in this case would be is jurisdiction. The Joint Magistrate sent his explan- this effect. He begins by admitting that he was not ɔd to entertain cases without complaint, and then he t it cannot be said that he acted in the present case omplaint, for he acted upon a demi-official communi- ' the District Superintendent of Police as well as on mplaint of that officer. It does not seem to be clear these two things formed in his view the complaint ich he proceeded, but I think it was the former. Then n to say that "there were strong reasons which prevented ict Superintendent recording any public proceeding in er until he was in the position to have the evidence fore a Magistrate." Then, further on he expresses an that the case would have fallen through had not the on been kept quiet till he arrived and recorded the of the witnesses. So far from removing any doubt n from the statement of the petitioners, that they had informed what the charge against them was, that on seems to show almost conclusively that they were formed. It is nowhere asserted by the Joint Magistrate mmunicated the contents of the letter from the police e accused; and it is very extraordinary that that letter ppear upon the record. The Joint Magistrate thought le importance that he did not even preserve it and oduce it when asked to do so.

n argued before us that the petitioners' own petition, together with the record, shows that they were t the nature of the charge was. I think it is the examination of the petitioners, which appears agistrate's record at the end of the proceedings,

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was taken before the evidence of the witnesses was recorded; but from the perusal of that examination I think it impossible to infer that the accused were informed what the charge against them was, or that they were given thereby to understand that they were about to be put upon their trial for any particular offence. The first question that was put to the petitioner Acharjee Lall, was a question relating to the charge of theft; and it was in reference to that, and not in reference to any charge against himself, that he had been summoned to attend. No doubt some very general questions were put to him, as to whether or no he had given any information of any theft at all; but what then passed seems to me to be more like a scolding by the Joint Magistrate for general misconduct, than an enquiry such as is contemplated by section 206 of the Criminal Code, and such as would show a man that he was about to be put upon his trial for any particular offence.

It was argued before us that the first document which appears on the Joint Magistrate's record was the complaint in this case, and it is headed no doubt "the complaint of Seo Pershad Lall;" but the use of the word "complaint" is merely accidental, because many of the depositions which follow are also headed in that way.

It is clear, therefore, that the word "complaint" indicates nothing. It happened to be the word used in the printed forms which were then available. It is also clear that this man was treated as a witness, because a note is made that he was not cross-examined. It is not in fact even suggested by the Joint Magistrate that this man was the complainant in this case. The Sessions Judge is, no doubt, right in saying that what the Joint Magistrate really acted upon was the information given him by the District Superintendent of Police.

Under these circumstances we can come to no other conclusion upon the Joint Magistrate's own explanation and what appears upon the record, than this,—that these two petitioners never had any clear statement made to them that they were about to be put upon their trial, or of what the offence was which was charged against them. That is a sufficient ground for disposing of this case, and on that ground alone I should have

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Judgment.

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no hesitation in quashing the conviction. But I also think that neither of these two persons would come within section 90 of the Code of Criminal Procedure. With regard to the person who appeared to be really a *Kazanchi,* although possibly he performs some other duties, I do not think that he would be an agent within the meaning of that section, under any circumstances, unless we extend this section to all servants of zemindars, which I certainly should not feel disposed to do. With regard to the Dewan he might be an agent within the meaning of the Act, if his master was absent; but it would be unreasonable to extend the operation of the Act to a Dewan who was acting only under the orders of his resident master. The section is exceedingly vague in its language; and, unless strictly construed, might be made the instrument of great oppression. The conviction and sentence must be set aside, and the petitioners released.

PRINSEP, *J.*

PRINSEP, *J.* :—

I also agree in setting aside the conviction and sentence recorded by the Joint Magistrate in this case.

The object of the Code is to secure a fair trial to every person accused of a criminal charge, and it requires that in a summon's case there should be ordinarily a complaint, and a summons specifying the nature of the complaint. There are certain expressions used in the Code, the object of which is to prevent certain irregularities in matters of form from interfering with the course of justice; but, in the present case, and in fact in all summons' cases, it is absolutely necessary that a person in the presence of a Magistrate should know that he is then about to be tried, or, in the terms of section 206, that the substance of the complaint should be stated to him; and he should be asked if he has any cause to show why he should not be convicted.

Now there is nothing in the present case to indicate that either the Dewan or the *Kazanchi,* who were in attendance to give information regarding a theft case, were informed that they were themselves under trial. The nature of the questions put to them, and the information required, would, as has already been out by Mr. Justice MARKBY, be more in the nature of fault with them for some want of co-operation with the

[illegible]

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF HUROSOONDERY CHOWDHRAIN . . . . . } PETITIONER.

1878 *June 24th.*

No. 105 of 1878.

Section 330, Code of Criminal Procedure—Examination of witness by Commission—Appearance of Magistrate to show cause—Practice—Letter—Legal Remembrancer.

Where a rule is issued, directing a Magistrate to show cause, and he wishes to do so, he should apply to the Legal Remembrancer to have an appearance entered for him in the High Court.

The fact that a Hindoo lady is expected to make false statements is no ground upon which an application to take her evidence on commission should be refused.

RULE calling on the Magistrate of Mymensingh to show cause why an order directing the issue of a commission to examine one Hurosoondery Chowdhrain should be withdrawn.

Paul, (Advocate General,) in support of the rule.

The judgment of the High Court (1) was delivered by

AINSLIE, *J.* :— AINSLIE, *J.*

On the 12th of this month we made an order, directing the Magistrate to issue a commission for the examination of Hurosoondery Chowdhrain, at the same time giving him leave to show cause why the order should be withdrawn. The Magistrate has now sent up a letter addressed to the Registrar of this Court. This is not the proper form in which he ought to have shewn cause. If he wished to show cause, he should have applied to the Legal Remembrancer to cause an appearance to be made for him in Court.

We might deal with this matter as if the Magistrate had not made any appearance at all; but we think it better, under the circumstances, to dispose of the rule on its merits.

The reasons assigned by the Magistrate in his letter appear to us to be wholly insufficient. It may be that this lady as well as

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[illegible] any other person under examination may make statements whic[illegible] are not wholly true, but the Magistrate can guard against th[illegible] by deputing some person thoroughly instructed for the purpose [illegible] examining on any fresh matters that may arise on her answers t[illegible] written interrogatories, if it is necessary in this case to issu[illegible] written interrogatories at all. At any rate we cannot assum[illegible] beforehand that the witness will make false statements.

There is in the letter of the Magistrate some indication th[illegible] an attempt was to be made to make the witness criminate hersel[illegible] by her answers. This ought not to be done, and is a furthe[illegible] reason for directing that she should be examined by commissio[illegible] in order that the answers which she may give may be carefull[illegible] weighed by her and not given without full consideration. Th[illegible] rule is made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

[illegible] IN THE MATTER OF JUGGOOBSHARY CHOWDHRAIN . . . . . } PETITIONER

Actual Possession—Possession of Agent—Wife's Possession—Code of Criminal Procedure, sec. [illegible].

In an inquiry under section [illegible] of the Code of Criminal Procedure the only thing to be determined is the fact of actual possession.

In a dispute between the wife of a lunatic and the manager of his estate, with regard to the possession of certain property, the Magistrate attached the property under section [illegible] of the Code of Criminal Procedure, on the ground that he was unable to satisfy himself as to wh[illegible] was in possession. It had been proved before him that the wife was in actual possession, but there was a doubt as to whether she was not in possession merely as the agent of her husband. *Held*, that section [illegible] has only to do with actual possession, and that the Magistrate should have decided that the wife was in possession.

CRIMINAL REFERENCE from the Judge of Backergunge.

Paul, Advocate-General, for the Petitioner. Baboo *Bhoo[illegible] Mohan Dass*, with him.

Allen, for the Opposite Party. Baboo *Bussunt Coomar Bo[illegible]* with him.

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Judgment.

WHITE, *J.*

The following judgments were delivered by the High Court (1):—

WHITE, *J.*:—

The Magistrate has passed an order in this case under section 531 of the Criminal Procedure Code, deciding that none of the parties before him were in possession of a certain mehal; and accordingly directing it to be attached. The parties before him were the manager on behalf of Mothooranath Roy, (who is a lunatic, and the management of whose property is vested in the Court of Wards,) and Juggodeshary Chowdhrain, the wife of the lunatic.

It appears from the judgment of the Magistrate that, when this application was made to him in March last, Juggodeshary Chowdhrain was in possession of the mehal. What was doubtful was, whether that possession was on her own behalf or for her lunatic husband. It also appears from the judgment that the mehal had been purchased in her name, but managed by the husband up to the time of his coming under the Court of Wards, and that Joggodeshary was certainly, for a month or two previous to the application, collecting the rents and doing so under a claim of right on her behalf. With these facts before him, we think that the Magistrate ought not to have decided that none of the parties was in possession; and that he has committed a material error in doing so. Whether Juggodeshary's claim to hold the mehal for herself is a good one or not, must be determined by a suit in a Civil Court. The question is really one of title, with which the Magistrate had nothing to do. It is clear upon his own finding of the facts that Juggodeshary is the party who is actually in possession. We accordingly set aside the order of the Magistrate.

PRINSEP, *J.*

PRINSEP, *J.*:—

The only question involved in this case is the question of actual possession of the subject-matter of dispute. The parties to the case were the wife of the lunatic and the estate of the lunatic

(1) WHITE and PRINSEP, *J.J.*

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Judgment

PRINSEP, J.

as represented by the Court of Wards. The estate was placed under the Court of Wards in September, and the Magistrate has found that from that time up to January the manager of the Court of Wards had great difficulty in collecting rents; that he collected only a small sum, about one hundred rupees; and that, finally, in the course of January, he ceased to make any attempt to collect the rents. On the 23rd of March, the present case was instituted by the Magistrate under section 530. As I have already said, the sole point was to determine the fact of actual possession; and, as section 530 also states, without reference to the merits of the claims of any party to a right of possession. The finding of the Magistrate clearly indicates that the wife was in possession and remained in possession, and that whatever possession the manager may with difficulty have obtained by collection of rents from some stray ryots, it ceased in January. Therefore, it is difficult to understand how the Magistrate, having found these facts, has come to the conclusion that he was unable to find who was in possession on the 23rd of March.

As the Magistrate in his official capacity as collector was in the management of this very estate, and as the general manager under the Court of Wards was his subordinate, I agree with the remark of the Judge that the Magistrate would have shown a better discretion, if he had left the decision of this case to the Joint Magistrate.

[CIVIL APPELLATE JURISDICTION.]

:UP CHAND CHOWDHRY . . . . . PLAINTIFF;

AND

ATU CHOWDHRY AND ANOTHER . . . . DEFENDANTS.

1878 *June 14th.*

No. 104 of 1877.

resumptions—Joint Family—Coparcenary—Hindoo Joint Family—Joint Ownership.

Per MITTER, *J.*:—When parties, who are not Hindus, reside in a Hindu country, and, adopting the customs of Hindus, have lived as Hindu families do, joint in food and estate, they will be governed by the Hindu law of coparcenary, and the legal presumptions applicable to the position of a joint Hindu family will be applied to them.

Abraham vs. *Abraham*, 9 Moore's Ind. Ap., 195; and *Vellai Mira Ravuttan* vs. *Mira Moidin Ravuttan*, 2 Mad. H. C. R., 414, followed.

Luddentonnissa vs. *Najada Khatoon*, 2 C. L. R., 308, explained.

Achima Bebee vs. *Azeezoonissa Bebee*, 11 W. R., 45; and *Moonshee Sirdar* vs. *Mulungo Sirdar*, 24 W. R., 1, followed as to manner of dealing with evidence of joint ownership.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Chittagong, reversing that of the Moonsiff of Howrah.

Baboo *Aukhil Chunder Sen*, for Appellant.

Moonshee *Serajul Islam*, for Respondent.

The facts of the case are sufficiently set forth in the following Judgments, which were delivered by the High Court (1):—

MITTER, *J.*:— MITTER, *J.*

The plaintiff and defendant are two uterine brothers. The plaintiff alleges that they lived together as members of a joint family,—owning moveable and immoveable properties, ancestral and acquired,—after the death of their father, and that they separated on the 13th Assin 1236 M.E., but the properties have not been divided. The present suit has been brought for division of these properties, and for the recovery of the plaintiff's share.

(1) MITTER and MACLEAN, *J.J.*

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Judgment.

MITTER, J.

The defendant denied the plaintiff's allegation that the brothers separated in 1236 M.E. He states that they have been separated for more than twelve years, and their transactions are separate from that time. He claims some of the properties as his own, and others he asserts to be in possession of a third party, and do not belong to the brothers. The remainder he admits to be ancestral properties, but he says that the brothers have been in separate possession of their distinct shares for a long time.

The Moonsiff found that the two brothers lived as members of a joint family till 1236, when they separated; that the plaintiff worked for gain in a distant country and remitted his earnings to the defendant, while the plaintiff's wife lived in the joint family, and was maintained in it. Under these circumstances the Moonsiff held that all the acquisitions made during the time the brothers lived as members of a joint family, must be considered joint until the contrary is proved. The Moonsiff was of opinion that the defendant had failed to prove the contrary. Finding also that the objection as to a portion of the properties belonging to a third party had not been made out, he decreed the claim, excluding from the decree the claim for partition of revenue-paying estates.

The defendant appealed, and the Subordinate Judge has reversed the Moonsiff's decree in respect of properties claimed by the defendant as belonging to him exclusively. The Subordinate Judge says:—"Looking at the judgment of the Moonsiff, it appears to me that he has proceeded on an erroneous view of the law governing the plaintiff's case. The Moonsiff has found that the parties have lived as members of a joint family, and upon that finding he has cast the burden of proof upon the defendant. The parties are admittedly *mughs*. They are not governed by the Hindu law. The presumption arising from the fact of the members of a family governed by the Hindu law, living joint in estate that all property acquired during the continuance of that state of joint, does not apply to this case. The plaintiff must establish by direct evidence that the properties in dispute are the ancestral properties of himself and the defendant, or the joint acquisitions of both, before he can be entitled to a decree. In this, I am of opinion that he has failed. The oral evidence hardly proves

· of the kind. The most that the witnesses for the plaintiff ı, that the plaintiff and the defendant lived joint in food and ı. Some of them say that the plaintiff lived generally at ı and Chittagong, where he had employment, and whence he to send money to the defendant. But what amount of money laintiff sent to defendant does not appear from the evidence, ı there anything to show that the defendant purchased any of roperties with money sent to him by the plaintiff, or that the ı sued for were for his money. The evidence also does not prove he lands in dispute have been held by the plaintiff jointly with lefendant. Of the three kobalas produced by him, one is in r of the defendant, the remaining two are in plaintiff's favour; ıe defendant, it appears from his written statement, has no ıion as to the right and title of the plaintiff in regard to ands covered by them. The defendant admits the right itle of the plaintiff as to the whole of the lands covered by ınd as to a half share of the lands covered by the other.

is clear from his judgment that he does not displace the ıiff's finding that the brothers lived as members of a joint y, but he thinks that the presumption of Hindu Law, that joint family, acquisitions must be presumed to be joint the contrary is proved, cannot apply to this case, because ırties are admittedly *mughs*. He is also of opinion that laintiff cannot succeed in this suit unless he proves by direct nce that all the properties are joint.

ere is no distinct written admission in the record that the ıs to this suit are *mughs*. Probably this fact was admitted e course of the argument before the Subordinate Judge.

e pleader for the plaintiff says before us, that they were nally Hindus by religion, but have become *mughs* by loss ıste. But be that as it may, we do not think that the rdinate Judge has taken a correct view of the law in this Whatever may be the religion of the parties, and sup- g they are *mughs* by descent, they would be governed by Hindu Law of coparcenary if, residing in a Hindu country, gst Hindus, and adopting the custom of Hindus, they have in a state of joint family just as Hindus do both as regards and estate. The decision of the Judicial Committee of the

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MITTER, J.

Privy Council in *Abraham* vs. *Abraham* (9 M. I. A., pp. 236 and 237), is a clear authority in support of this view. In that case the parties were brothers who were descendants of Hindu converts to Christianity, and one of them contended that the Hindu Law of coparcenary applied to them. In the course of their decision upon this question, the Judicial Committee make the following observations:—"The first and most important question raised by this appeal is by what law the rights of these parties ought to be determined. In considering this question it is material in the first place to observe what was the real point in issue in the cause. Laying out of consideration the objection raised by the answer, that the plaintiff, Charlotte Abraham, as widow, could not sue jointly with the other plaintiffs, her sons, an objection of misjoinder of parties which, in their Lordships' opinion, was properly answered by the replication, and properly disposed of by the Sudder Court when the case was first brought before it by appeal, the true question at issue in this case is, not who was the heir of the late Mathew Abraham, but whether he and the respondent formed an undivided family in the sense which those words bear in the Hindu Law with reference to the acquisition, improvement, enjoyment, disposition, and devolution of property. It is a question of parcenership and not of heirship. Heirship may be governed by the Hindu law or by any other law to which the ancestor may be subject, but parcenership, understood in the sense in which their Lordships here use the term, as expressing the rights and obligations growing out of the *status* of an undivided family, is the creature of, and must be governed by, the Hindu Law" (pp. 236 and 237.) If, therefore, the parties in this case at one time "formed an undivided family in the sense which these words bear in the Hindu Law," they must be governed by the Hindu Law with reference to the question arising out of "the rights and obligations growing out of the status of an undivided family," whatever may be their religious persuasion. The Subordinate Judge is, therefore, wrong in thinking that the Hindu Law does not govern this case so far as the question of joint acquisition is concerned.

The Subordinate Judge has committed a further error of (supposing the Hindu Law does not apply) in laying down the

plaintiff must establish the joint acquisition by direct evidence. Suppose the parties are not governed by Hindu Law, but it is proved that the two brothers messed at a common board, remained in joint possession of certain properties of which they are joint owners, and defrayed the joint expenses of their family from the profits of the joint estate. Suppose one of the brothers, residing in the family house, managed the affairs of the joint family without any means of acquiring any wealth, while the other brother was employed at a distant country earning money and remitting part of his earnings to his brother. Independently of the Hindu Law, would it be erroneous to infer that, while this state of things was in existence, any new property purchased by the brother residing at home was made from the joint funds? It seems to me that, under the circumstances it would be a just and reasonable inference. But the Subordinate Judge thinks that it would be an error of law in making this inference. I am of opinion that his view in this respect is incorrect, and is opposed to the decision of the Madras High Court reported in the 2nd Madras Reports, page 414—*Vellai Mira Ravuttan* vs. *Mira Moidin Ravuttan.*

The pleader for the respondent, in support of the view taken by the Subordinate Judge, has cited the decision of this Court in *Luddentoonissa* vs. *Najada Khatoon*, 2 C. L. R., 308. I do not think the decision quoted really supports the view of the Subordinate Judge. Mr. Justice MARKBY in his judgment distinctly says that he does not dissent from the view taken in the above-mentioned Madras Ruling, which was also cited before him. In the case before Mr. Justice MARKBY the question of joint acquisition arose between the members of a Mahomedan family. The lower Appellate Court in that case, without referring to the presumption of joint acquisition, held upon other evidence that the plaintiff had failed to prove that a particular property in dispute was joint acquisition. All that was decided by this Court was that, in omitting to apply the presumption of the Hindu law in that case, the lower Appellate Court's judgment was erroneous in law. From that judgment it is quite clear to me that, if the lower Appellate Court had applied the presumption in question, this Court would not have held that its judg-

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ment was wrong. In the case under consideration the Subordinate Judge is of opinion that the Moonsiff is wrong in law in relying upon this presumption. The decision quoted, far from supporting his view, is to a great extent opposed to it.

Then it has been said that notwithstanding this error, the Subordinate Judge has, upon the evidence, held that the plaintiff has failed to prove his case. If I am right in the view which I have taken of the ruling of the Privy Council in *Abraham* vs. *Abraham*, it was for the defendant to prove that the properties claimed by him are his self-acquisition, and it would not affect the plaintiff's claim in the least degree if he failed to prove by direct evidence that they have been acquired from the joint funds. But, supposing that the Privy Council Ruling does not go to that extent, still I think the judgment of the Subordinate Judge is erroneous in law. The Subordinate Judge does not disbelieve the evidence adduced by the plaintiff, but he thinks that that evidence does not establish necessary facts, by establishing which alone he can succeed. He says: "The evidence also does not prove that the *lands in dispute* have been held by the plaintiff jointly with the defendant." It would appear from what precedes this passage, that its evident meaning is, that the evidence of the plaintiff, even if believed, does not show that he held jointly with the defendant the lands in dispute. It is for that reason the Subordinate Judge has italicized the words "the lands in dispute." He is right that the witnesses do not specifically mention the lands in dispute; but he is not right in the view which he has taken of that evidence. His view is clearly opposed to the two rulings of this Court, reported at page 45 of the 11th W. R.—*Achima Bebee and another* vs. *Azeezonnissa Bebee and others*, and at page 1, 24 W. R.—*Moonshee Sirdar and others* vs. *Mulungo Sirdar and others*. I do not think that it is necessary to remand this case to the lower Appellate Court. It seems to me that the Subordinate Judge does not disbelieve the plaintiff's witnesses, but he has modified the Moonsiff's decree upon an erroneous view of the Law. We, therefore, reverse his decree with costs in this Court and the lower Appellate Court, and restore that of the Moonsiff.

MACLEAN, *J.*:—

In this case the plaintiff alleged that, during his absence from home, his uterine brother, the defendant Latu, to whom he remitted money from time to time, made sundry additions to the family property; and, notwithstanding their separation in 1874, has refused to make any division of the family estates. He therefore sued for a division.

Defendant, Latu, denied that the joint estate continued down to 1874, alleged separation more than 12 years ago, and stated that, with the exception of three parcels of land, which were ancestral, and three parcels, which were acquired by plaintiff alone, and some which belonged to neither of them, the rest of the properties in suit were his own, and in his exclusive possession for more than twelve years.

The first Court found that the brothers were joint in food and estate down to 1874, and that all the properties, except the ancestral properties, were acquired prior to that date. The Moonsiff, therefore, threw upon defendant the burden of proving his plea of having acquired them himself; and, considering that he failed to do so, decreed the plaintiff's claim for most of the properties.

Upon appeal the Subordinate Judge differed from the Moonsiff in the view he had taken of the law. He held that the parties were *mughs*, and were not governed by Hindu Law, (although I do not see that this was a point raised in the first Court); and then, holding that the plaintiff had failed to prove joint acquisition of the brothers, or joint possession of the lands in dispute, he dismissed the plaintiff's claim for everything which the defendant claimed as his own.

In special appeal it is contended that the parties are governed by the Hindu law of property, and that the Subordinate Judge was wrong in holding the contrary. It is also contended that, as the evidence shows that the family was joint and undivided, the Court should presume they held these properties as joint owners.

With reference to the property law applicable to the parties, I am disposed to hold that the Subordinate Judge was not right in laying down that Hindu law was inapplicable, unless the

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MACLEAN, J.

evidence taken by the Moonsiff was directed to that point. As far as I can judge from the pleadings, (plaint and written statement,) the parties met upon the ground that Hindu law did govern their family affairs; the Moonsiff was not, therefore, wrong in putting the defendant to the proof of his plea of separate acquisition, and if I had any doubt about this I should consider that the case should go back in order that the point might be fully tried out.

I consider that, as the evidence satisfied the Moonsiff that the family lived on terms of joint food and estate, and as the Subordinate Judge confirms the Moonsiff's finding on this point, he ought not to have disturbed the judgment of the first Court, unless he found distinctly that the defendant had proved separate acquisition by himself of such properties as he said were his own.

I think that the decision of the Subordinate Judge is wrong, and that the appeal should be decreed, the Subordinate Judge's decree reversed with costs, and that of the Moonsiff restored.

[CIVIL APPELLATE JURISDICTION.]

RAB ALI . . . . . PLAINTIFF; 1878 *June 20th.*

AND

HOMED AMEER HOSSEIN AND OTHERS . DEFENDANTS. Nos. 279, 298 of 1876.

itation—Possession within twelve years—Dispossession—Act IX of 1871, *Sch. II., Art.* 91.

In a suit for possession on the ground of previous dispossession it is not necessary that the plaintiff should prove a dispossession at the precise time mentioned in the plaint. If he shows that he was in possession within twelve years before the commencement of the suit, and was dispossessed by the defendant at any time within those twelve years, he has *primâ facie* to recover.

What suits are governed by Act IX of 1871, Sch. II, Art. 91, stated.

EGULAR APPEAL from a decree passed by the Officiating bordinate Judge of Patna.

The facts of this case are as follows :—The parties are the heirs one Mahomed Afzal, who died on the 16th of February 1844. homed Afzal had three wives, Zaban, Bibijan and Wajiha, two former of which survived him. The plaintiff and several the defendants are the children of Zaban, the other defen- ts are the children of Wajiha. Bibijan died, childless, on 19th of May 1851.

The plaint alleged that Bibijan was entitled to certain property her own right; that she sold this property to the plaintiff ab Ali, on the 11th of May 1851. The defendants admitted the property stood in the name of Bibijan, but alleged that been purchased by Mahomed Afzal, in her name, *benami* im; and they claimed their share as his heirs.

remainder of the property in dispute appears to have stood name of the plaintiff, Torab Ali, and was claimed by him own. The defendants alleged that the plaintiff, being the son, had managed the family property after the death of med Afzal, and that he had bought this property in his me, with funds belonging to the joint property, and they their respective shares in it on that ground.

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Statement.

It appeared from the record, that the parties to the present suit disputed the ownership of these properties, as far back as 1861; for, in the beginning of 1862, some of the present defendants instituted a suit under Act IV of 1841, against the present plaintiff, Torab Ali, who claimed to be then in possession as owner. The Deputy Magistrate of Nowabad found in his favour and upheld his possession by an order, dated the 28th of February 1862. The defendants appealed from this order, which was set aside by the Sessions Judge of Behar on the 31st of May 1862, on the ground that, as the case related to an undivided mehal, the Deputy Magistrate had no power to pass an order for possession under Act IV of 1840.

Shortly afterwards Torab Ali instituted a suit for "confirmation of possession" in the District Court of Gya, but the suit was dismissed on the 3rd of October 1863, and this decision was confirmed by the High Court in regular appeal on the 2nd of June 1864. Torab Ali appealed to the Privy Council, and their Lordships, on the 2nd of November 1872, affirmed the judgment of the High Court, on the ground that the evidence put forward by Torab Ali was insufficient to show that the possession which he claimed to have was a consequence of the title he put forward, the latter not having been proved to be a good and valid title.

Pending the last-mentioned suit, the plaintiff brought several rent suits against tenants in possession of the property, in some of which he was successful, and in others not; but they were all confined to the question at issue between the plaintiff and the tenant, and no question of title between the plaintiff and the present defendants was gone into, though some of them intervened in those suits.

In 1866, one Mahomed Akbar, claiming to be a mocurrarid of a portion of the property in dispute in the present suit, sued some of the tenants, Jhamman Mahton and others, for rent, and on the 14th of December 1866 obtained a decree. The present defendant applied to be made a defendant in that suit, but his application does not seem to have been attended to, and is not noticed in the judgment of the Court.

In the present suit, the Subordinate Judge referred to litigation above set out; and, holding that it showed that

plaintiff had not been in possession within twelve years, dismissed the suit with costs. Plaintiff appealed.

Mr. *R. E. Twidale*, for Appellant.
Moonshee *Mahomed Yusuf*, for Respondent.

The judgment of the Court (1) was delivered by

GARTH, *C.J.* :—

GARTH, *C.J.*

We think that this appeal should be decreed. The Subordinate Judge in the Court below is wrong upon one point which he has dealt with in regard to the issues in his judgment. He appears to have entirely misunderstood the nature and legal effect of the proceedings to which he has alluded, and upon the strength of which he has decided that the plaintiff's claim is barred by limitation.

The first of these proceedings is the former suit which was brought by the plaintiff. The Subordinate Judge has decided, that in that suit it was held by the High Court, and also by the ultimate judgment given by the Privy Council on the 2nd of November 1872, that the plaintiff was not in possession of the property then in question at the time when that suit was commenced, and that the judgment of the Privy Council is a conclusive finding against the plaintiff on that point. The Subordinate Judge then proceeds to say, that, as the suit was decided upwards of twelve years before this suit was commenced, and as the land in question in that suit is the same as that now sought to be recovered, the present suit must be considered as barred by limitation. It is perfectly true that, in the former suit, there was an issue fixed in the Court of First Instance, which raised the question of the plaintiff's possession, but the nature of the claim then was entirely different from that in the present suit, and rendered it immaterial to consider whether the plaintiff was possessed generally. What he claimed was to be confirmed in possession under a particular title, and asked the Court to make a declaration to that effect. It was not sufficient for him in that case to prove that he was in possession. He was bound to show that he was in possession by virtue of that title.

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In the present suit, the Subordinate Judge referred to the litigation above set out; and, holding that it showed that the

plaintiff had not been in possession within twelve years, dismissed the suit with costs. Plaintiff appealed.

Mr. *R. E. Twidale*, for Appellant.
Moonshee *Mahomed Yusuf*, for Respondent.

The judgment of the Court (1) was delivered by

GARTH, *C.J.*:—

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We think that this appeal should be decreed. The Subordinate Judge in the Court below is wrong upon one point which he has dealt with in regard to the issues in his judgment. He appears to have entirely misunderstood the nature and legal effect of the proceedings to which he has alluded, and upon the strength of which he has decided that the plaintiff's claim is barred by limitation.

The first of these proceedings is the former suit which was brought by the plaintiff. The Subordinate Judge has decided, that in that suit it was held by the High Court, and also by the ultimate judgment given by the Privy Council on the 2nd of November 1872, that the plaintiff was not in possession of the property then in question at the time when that suit was commenced, and that the judgment of the Privy Council is a conclusive finding against the plaintiff on that point. The Subordinate Judge then proceeds to say, that, as the suit was decided upwards of twelve years before this suit was commenced, and as the land in question in that suit is the same as that now sought to be recovered, the present suit must be considered as barred by limitation. It is perfectly true that, in the former suit, there was an issue fixed in the Court of First Instance, which raised the question of the plaintiff's possession, but the nature of the claim then was entirely different from that in the present suit, and rendered it immaterial to consider whether the plaintiff was possessed generally. What he claimed was to be confirmed in his possession under a particular title, and asked the Court to make a declaration to that effect. It was not sufficient for him in that case to prove that he was in possession. He was bound to show that he was in possession by virtue of that title.

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It is clear that all that the High Court decided was, that he was not entitled to the declaration which he sought; and when the judgment of the Privy Council comes to be examined, it is equally clear that their Lordships directly avoided determining the question of the plaintiff's possession. After discussing the judgment of the Courts below, and certain portions of the evidence, their Lordships say: "Under these circumstances the Court cannot say that they are so satisfied affirmatively of the plaintiff's title, that they can declare not only that he has possession, as he says he has, but that he has that possession in consequence of a valid and good title. The Court cannot make such an affirmative declaration of title upon the evidence which has been given in the cause. Their Lordships are, therefore, of opinion that the decision of the Court below is substantially correct, and that the suit ought to be dismissed." Then they go on to say: "Looking, then, to the case as it stands, the nature of the suit, and the nature of the evidence that has been given, their Lordships think that the appeal ought to be dismissed, and the judgment of the High Court affirmed. That is, they find that the judgment should be affirmed so far as it dismisses the plaintiff's suit, but that the dismissal of the suit ought not to be treated as a binding adjudication of title between the parties."

It is manifest that their Lordships intended to leave the question of title and possession open. All that they decided was, that the plaintiff was not entitled to that which he sought, namely, a declaration that he was in possession of the property by virtue of a particular title. The decision clearly did not amount to a finding, as the Subordinate Judge supposes, that at the time of the commencement of the suit the plaintiff was not in possession.

The next proceeding upon which the Subordinate Judge founds his opinion was one taken before the Magistrate under Act IV of 1840. This arose in consequence of a dispute between the parties, and was decided by the Magistrate in favour of the plaintiff. An appeal was then made to the Sessions Judge, and he decided that, as the property was *ijmallee*, it could not be made the subject of proceedings under the Act. He, therefore, reversed the decision of the Magistrate.

For some reason or other the Subordinate Judge imagines that the decision of the Sessions Judge, the effect of which was merely to neutralize the proceedings under Act IV altogether, had the effect of establishing that the plaintiff was not in possession of this property. How he could arrive at such a conclusion it is difficult to imagine, but that seems to have been his view; and it is one of the grounds on which he finds that the present suit is barred.

Then there appears to have been thirteen suits brought by the plaintiff for the rents of particular portions of this property; and the claim in these cases appears to have been founded upon kabulyuts, which the plaintiff said the defendant tenants had executed to him. The present defendant intervened in two of these suits, and in those suits as well as in two others, the plaintiff was successful. In the other nine he was not successful. He was defeated on the ground that he could not prove the kabulyuts alleged to have been given by the defendants.

But these suits, when they come to be looked at, have really nothing to do with the question in this case, nor could any of them, except two, be any evidence in it. In the first place they were suits *inter alios*. In the next place, their subject-matter was confined to the question, whether the defendants had executed the alleged kabulyuts or not, and the Moonsiff, in deciding them, distinctly says that he cannot go generally into the question of possession and title between the parties, which must be the subject of another suit. The only question for him to decide was, whether the defendants had executed the kabulyuts in favour of the plaintiff or not. When we look at the subject-matter of these suits, and consider who the parties to them were, and the question which they raised, it is clear that the judgments given in them could not be evidence of any weight against the present plaintiff.

These are the only materials, so far as we can see, upon which the Subordinate Judge professes to decide, that the plaintiff was not in possession within twelve years before this suit; and he has actually excluded the plaintiff from giving any oral evidence in the case, because he says that, upon the documentary evidence alone, the plaintiff must be taken to have been out of possession for more than twelve years before suit.

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GARTH, *C.J.*

It is clearly necessary for the purpose of ascertaining whether the plaintiff has been in possession of this property within twelve years before suit, that the Subordinate Judge should go into the oral evidence, and try the case upon its merits.

Then as regards the fifth issue, which raises the question, "whether the date of dispossession stated in the plaint is correct or no," the Subordinate Judge has taken a very incorrect view. In the first place he professes to decide that issue solely upon the result of a particular proceeding, viz., a suit by Mahomed Akbar *vs.* Mahton and others, in which the plaintiff put in an objection; and, in the next place, he seems to think that, if the date of dispossession mentioned in the plaint is not strictly proved, the plaintiff's suit must fail. Now, on both these points, he is clearly wrong. In the first place, it is quite immaterial to the real merits of the suit, whether the plaintiff's dispossession occurred on the precise date on which he has stated it; and, in the next place, so far as it may be material to ascertain the time of dispossession, it was wrong to come to a conclusion upon one circumstance only to which the Subordinate Judge has adverted, and to exclude the plaintiff from giving oral evidence upon that point.

It is necessary here, not only for the purpose of showing that the judgment of the Court below is incorrect, but with a view to the new trial which must necessarily take place, that we should point out that the fifth issue, as it is now framed, may lead to misapprehension. It is clearly not necessary in order to entitle the plaintiff to succeed in the suit, that he should prove a dispossession at the precise time mentioned in the plaint. If he was in possession within twelve years before the commencement of the suit, and was dispossessed by the defendant at any time within those twelve years, he has a right to recover the property. The Subordinate Judge, when he tries the case again on the merits, must bear this steadily in mind. The fifth issue, as it is now framed, is really immaterial. The seventh issue raises the question in a more correct, though perhaps too general, form.

Then there is another point to which we must also refer for the purpose of preventing any mistake on the re-trial. The Subo

linate Judge considers that the plaintiff ought to have brought a suit, not only for obtaining possession as against the defendants, but also for setting aside a *mokurrari* lease which was granted by the defendant's ancestor, Mohamed Takki; and he says that, if the plaintiff had sued to set aside that lease, the plaintiff would have had only three years instead of twelve within which to bring his suit, and that, consequently, the plaintiff ought not to be placed in a better position by reason of his not having sued to set aside that lease.

This again is quite wrong. The Subordinate Judge has quite misunderstood the meaning of Article 91, of the second schedule of the Limitation Act of 1871.

The defendants, according to the plaintiff's contention, are wrong-doers. They have dispossessed the plaintiff of property which, as he contends, belongs to him; and they have granted a *mokurrari* lease of it to a third person. The plaintiff was not bound, in bringing this suit, to ask to have the *mokurrari* set aside. It was quite sufficient for him to make the person, to whom the *mokurrari* was granted, a party to the suit. If the defendants were wrong-doers as against the plaintiff, they had no right to grant the *mokurrari*, and the persons who claim under them, whether by virtue of the *mokurrari* or not, are wrong-doers too. The Subordinate Judge is quite wrong in supposing that the three years' limitation would apply to such a case. Article 91 of the Limitation Act is applicable to a case where a man has himself, under false representation or for some other reason, granted a lease, which he desires afterwards to set aside, and then the Article provides that he shall take proceedings for that propose within three years of the time, that he is aware of the grounds which induce him to take these proceedings.

At the request of the plaintiff's pleader we think it right to add to the issues, which have been already fixed, this one: "Is the plaintiff entitled to the whole or any portion of his claim by virtue of any other title disclosed in the plaint?" The issues already framed appear to relate only to the first title under which the plaintiff claims, viz., that derived from Bibijan. This other issue is directed to the other claim, which he makes in the latter portion of the plaint.

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We now send back the case for re-trial upon its merits. is very much to be regretted that the Subordinate Judge h made so many mistakes; and we hope that the re-trial may b conducted with more care and correctness. The oral evidenc as well as the documentary, must be well considered, and th Subordinate Judge will be at liberty, when the case com before him again, to add, at the instance of either of the partie any other issues which he may think proper. The costs wi abide the result.

[CIVIL APPELLATE JURISDICTION.]

June 24th.

No. 180 of 1876

RUP NARAIN SINGH . . . . . PLAINTIFF;

AND

JUNKO BYE AND OTHERS . . . . . DEFENDANTS.

Endowment—Debutter—Appointment of manager—Removal of Manager—Manager.

The trustee of an endowment has not, as such, the power of tran ferring his trust to any other person. And where a trustee is en powered to appoint another trustee to act for him, he cannot transf the right of exercising that power to another or others.

The mode in which a suit for the removal or appointment of a Man ger to an endowment not coming within Act XX of 1863, stated.

Kal. Chern Gen. vs. Golabi, 2 C. L. R., 129, followed.

REGULAR APPEAL from a decree passed by the Subordinat Judge of Patna, dismissing the plaintiff's suit.

This was a suit for possession of, and for a declaration of rig to certain debutter lands, which were dedicated to the servi of an idol in the year 1825, by the then owner, Anupa Bye. Th deed contained a clause appointing one Ram Lall and his hei managers of the endowment; and declared that he and his hei should apply all the profit of the lands to the service of the id with the exception of Rs. 10 per month, the salary of the man ger, and Rs. 2 per month for a sweeper. By an *ikrarnam* dated one day later than the deed of endowment and appointme Ram Lall agreed to perform the services, and adhere to t

condition and stipulations of the deed of endowment, and agreed that if he appropriated anything more than what was fixed for his expenses, "then the lady aforesaid (Anupa Bye), and after her death, the punch, the inhabitants of the said mohulla, shall be at liberty to appoint any other person as manager, and to have the works of religious services, and the management of the Thakoor-dowra, done by him. I and my representatives have not nor shall have any claim or dispute to raise."

By a *towliutnama*, bearing date the 11th of November 1870, which recited the deed of endowment and the *ikrarnama*, and which stated that the services of the idol had been carried on honestly by Ram Lall, and, after his death, by his son Ramaput Tewari, that Ramaput Tewari died childless, leaving surviving Mussamut Junko Bye, his wife, and that she, being a "purdah" female, was unable to perform the services of the idol, it was declared that it was necessary to appoint a trustworthy person, and the plaintiff was thereby appointed as manager of the endowment. This *towliutnama* was signed by five persons, who described themselves as the "punch" referred to in the *ikrarnama*.

Under this deed the plaintiff got into possession of some of the endowment lands, and he now sued for a declaration of right to the portion of which he was in possession, and to be put in possession of the remainder, which was held by Junko Bye and the other defendants, whom the plaint described as her lessees of the endowed property. The suit was dismissed in the Court below, and plaintiff appealed.

Baboo *Amarendro Nath Chatterjee*, for the Appellant.
Mr. *C. Gregory, and* Mr. *M. L. Sandel*, for Respondent.

The judgment of the Court (1) was delivered by

GARTH, *C.J.*—

GARTH, *C.J.*

We think that the Judge in the Court below was quite right in these cases. We do not see how the plaintiff can have a cause of suit, at any rate in the way in which he tries to

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RUP NARAIN SINGH v. JUNKO BYE.

Judgment.

GARTH, *C.J.*

enforce his claim. He does not ask, as one of the community interested in the proper performance of this religious endowment, to have the trust property administered, or to have any breach of trust, which may have occurred, rectified. What he asks is, to have a trust of the property, which he says has been improperly alienated from him, placed in his hands, and to be confirmed in his possession of the residue.

He founds his claim upon a deed of *towliutnama*, dated the 11th November 1870, which professes to be executed by a *punch* consisting of five persons, who are inhabitants of the neighbourhood; and he says, that these persons had a right to appoint him manager of the trust property, under an *ikrarnama*, which is said to have been executed by Ram Lall Tewari, the *sebait* of the idol, and the trustee of the endowed property, on the day after the original endowment was made.

We entertain great doubt whether, under the circumstances, the copy of the *ikrarnama*, which has been produced, is admissible in evidence at all. In fact there is considerable doubt whether the *ikrarnama* itself ever existed; but, even supposing the copy to be admissible, and supposing that the *ikrarnama* were actually executed by Ram Lall Tewari, as it professes to have been, we do not see how it assists the plaintiff's case. The *ikrarnama* purports to be a declaration of trust by Ram Lall Tewari, to whom the endowed properties were conveyed as *sebait* and trustee, stating that the conveyance had been made to him, and declaring that he would accept the trust, and would apply the profits of the estates, lands, monies, and so on, in the performance of the religious services, the distribution of food to travellers, and the like; that he would take Rs. 10 a month as his own remuneration, and pay Rs. 2 a month to a sweeper; that he would not spend any more than that amount on himself; and that, if he should appropriate any more than the sum fixed for his own expenses, then the lady who made the endowment, and, after her death, the *punch*, who were to be the inhabitants of the Mohulla, were to be at liberty to appoint any other person as *sebait* and manager, and to have the religious services and the management of the Thakoor-dowra carried out by such person.

Now, in the first place, we consider that Ram Lall Tewari, who was himself nominated as trustee under the endowment, had no right to transfer his trust to any other person. There is ample authority for this position. But then, again, it is to be observed that he does not profess to transfer the trust to any particular person. He only authorizes a *punch*, which is to consist of all the inhabitants of the neigbourhood, to appoint somebody else. Even if he had a power to appoint another trustee to act for him, this clearly was not the proper way to exercise the power.

Then, again, even if he had a right to confer this power upon the *punch*, the instrument by which the present plaintiff is appointed is clearly insufficient; because it is signed by five persons only out of the whole neighbourhood. If this power was a good one, it must have been exercised by all the inhabitants, instead of which we find these five persons constituting themselves a *punch*, apparently without the consent of the neighbourhood, for the purpose of appointing the plaintiff as manager.

And, lastly, it does not appear that there has been any breach of the trust, such as would justify the plaintiff in bringing this suit. The only way in which such a suit could be brought, supposing there had been any such breach, would be as we have pointed out in the case of *Kali Churn Giri* vs. *Golabi*, 2 C. L. R., 129, where we explained that in cases not coming within Act XX of 1863, the only way to bring a suit for enforcing the trusts of any religious endowment, is to sue in the name of some person or persons on behalf of himself or themselves, and all others interested in the due performance of the trust, stating what breach or breaches of the trust had been committed, and asking the Court to give directions, by framing a scheme or otherwise, for the purpose of having the breach of trust rectified, and securing its being properly carried out in the future.

There is no reason why the present plaintiff, or any other person interested in this trust, should not bring another suit in that form, if so advised; but, so far as we can see at present, the plaintiff has no right to call himself a trustee of the endowment, or to have possession of the trust property; and certainly has no right to sue, as he has done, in these two cases.

The appeals must be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

1878 June 27th.

No. 1072 of 1877.

RASH BEHARY BANERJEE . . . . . DEFENDANT

AND

PEARY MOHUN MOOKERJEE . . . . . PLAINTIFF.

Rent Suit—Arrears of Rent—Purchaser's Liability—Sale of Tenure.

The purchaser of an under-tenure, the rent of which is in arrea cannot be made personally liable for that portion of the rent whic accrued due before the date of his purchase.

Shama Chund Koondoo vs. *Brojo Nath Pal*, 21 W. R., 94, co sidered and explained.

SPECIAL APPEAL from an order passed by the Judge c Hooghly, affirming the decree of the Moonsiff of that district.

This was a suit for arrears of rent due for the years 1280-8 both inclusive. The lands for which the rent is claimed are pa of Mouzah Teesa Joykristopoor in Pergunnah Borro, and th plaintiff became putneedar of a half share in this mouzah o the 4th of Bhadro 1280 (19th of August 1873). In 1874, plai tiff brought a suit for the arrears of 1280 against the heirs c the tenant in whose name the tenure was recorded; but findin that the lands were then in possession of the present defenda who had, on the 12th of Kartick 1280 (27th October 1873 bought the right, title, and interest of the preceding tenant a sale in execution of a decree, plaintiff brought the prese suit against him for the rent of 1280, 1281, and 1282.

The defendant denied any liability for rents accruing due pr vious to his purchase, but the Court of First Instance gave plai tiff a decree which was affirmed on appeal. The defendant th brought this Special Appeal.

Baboo *Gopinath Mookerjee*, for Appellant.

Baboo *Ashootosh Mookerjee*, for the Respondent.

The judgment of the Court (1) was delivered by

GARTH, C.J. GARTH, C.J. :—

The judgments of both the lower Courts in this case h proceeded upon an erroneous view of the rent law. The

(1) GARTH, C.J.

ht by the plaintiff, who is the owner of a half share of , to re-cover from the defendant, the rent of that half which has been fixed at Rs. 111-3-10 annually,) upon ıd that the defendant has become the tenant of the ıt an auction sale, held on the 12th of Kartick 1280. claimed is from Bysack 1280 to the end of 1282. The t admits the plaintiff's right to the rent, which accrued r he (the defendant) purchased the jumma; but dis- e plaintiff's right to recover the rent, which accrued due is purchase.

natter of fact, the plaintiff did sue and obtain a decree he heir of the former tenant, for the rent due for the 30; but he abandoned that decree, and is now trying ver the same rent from the defendant in this suit. contended before the Moonsiff that, as the tenure itself e Rent Law might be made liable for arears of rent, and liability might be enforced against a purchaser of the the defendant, who in this case only purchased the tle, and interest of the defaulting tenant, purchased it to the defaulting tenant's liability, and was, therefore, ubject to be sued for the back rent. The Moonsiff appa- dopted this view, which was afterwards confirmed by r Appellate Court. But we think that both Courts rong. The fallacy of their argument arises from g the liability of the tenure, with the personal liability tenant. A landlord may, by obtaining a decree for ainst his registered tenant, bind the tenure itself in rt as to make it always liable to be sold for the of the decree, although it may be subsequently purchased il person. In other words, the tenure thus bound con- ubject to sale at the landlord's option, until the amount ecree has been satisfied, notwithstanding the tenure , by private sale or otherwise, into other hands. This lt of the Full Bench decision—*Shamma Chund Koondo Nath Pal*, 21 W. R., 94, upon which the Moonsiff's roceeds, and of other cases which are referred to in h judgment, and to which our attention was called ument.

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RASH BEHARY BANERJEE v. PEARY MOHUN MOOKERJEE.

Judgment.

GARTH, *C.J.*

In this case it so happens, that a decree obtained against the former tenant would not bind the tenure, because the plaintiff is only entitled to a fractional share, and not to the whole of the putnee. But that consideration does not affect the present question. Even if the tenure could have been bound by a decree obtained by the landlord against the registered tenant, that would only enable the present plaintiff to sell the tenure itself to satisfy the arrears. It would not enable him to sue the present defendant personally, for rent, which accrued due before the present defendant became the purchaser.

The remedies which are provided by the Rent Law for enforcing the payment of rent by sale of the tenure or by distress, are remedies *in rem*. The personal liability of one tenant cannot be transferred to another; but each succeeding tenant must be subject to his own liabilities.

The judgment of the Court below will be modified to this extent: that the defendant will only be liable for the rent which accrued due after the date of his purchase, the 12th Kartick 1280, with interest at 12 per cent.; and as the only question raised in the lower Appellate Court, and in this Court, was as to the rent which accrued due before the defendant's purchase, he ought to have his full costs against the plaintiff in these two Courts; and in the Court of First Instance the costs which he has to pay will be proportionately reduced.

[CIVIL APPELLATE JURISDICTION.]

RUNGO LALL MUNDUL . . . . . PLAINTIFF;

AND

ABDOOL GUFFOOR AND OTHERS . . . . . DEFENDANTS.

1878 *June 27th.*

No. 1021 of 1877.

Landlord and Tenant—Burden of Proof—Onus—Rent Decree, Effect of—Withdrawal of Suit, Effect of—Non-payment of Rent—Act I of 1872, *sec.* 109.

Where A brings a suit for rent of certain lands against B, and gets a decree, the effect of that decree is to establish the relationship of landlord and tenant between A and B.

When the relation of landlord and tenant has been established between two parties, the fact that the landlord instituted a suit for rent which he afterwards withdrew is not sufficient to show that that relationship has ceased.

Where the relationship of landlord and tenant has once been proved, the mere non-payment of rent, though for many years, is not enough to show that the relationship has ceased to exist, the tenant-defendant is bound to show that it has ceased by some affirmative proof; especially when the tenant does not deny that he still continues to hold the lands in question. Evidence Act, I of 1872, section 109, quoted.

SPECIAL APPEAL from a decree passed by the Judge of Hooghly, reversing that of the Moonsiff of Uloobariah.

This was a suit for arrears of rent of certain lands. In 1863, Heera Lall Seal, the then proprietor of these lands, brought a suit for rent against the present defendant's ancestors and predecessors in title and obtained a decree. In 1866, Heera Lall Seal brought another suit for rent which he withdrew, in consequence, as it was said, of being summoned by the then defendant to appear as a witness. In 1873, Heera Lall Seal granted a putnee of the lands to the present plaintiff, Rungo Lall Mundul, who instituted this suit for arrears of rent on the 16th of September 1876.

The defendants admitted that they hold the lands of which the rent was demanded, but they denied that the plaintiff or his predecessor was entitled to recover any rent from them. Plaintiff

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got a decree in the Court of First Instance, which was reversed o appeal. He then brought this special appeal.

Baboo *Hem Chunder Banerjee*, for Appellant.

Baboo *Troilokhya Nath Mitter*, for Respondent.

Judgment.

The judgment of the High Court (1) was delivered by

GARTH, *C.J.*

GARTH, *C.J.* :—

Our only doubt in this appeal has been, whether we ought t decide the case upon the materials before us, or to remand it fo re-consideration; and we think that perhaps the safest cours will be to remand it.

The suit was brought by the plaintiff to recover the rent c certain lands which are specifically described in the plaint as plot 1, 8, 9, and 12. The defendants' case was, that they were no tenants to the plaintiff at all. They do not say that they are nc in possession of the lands which are mentioned in the plaint, bu they say that they have no concern with any lands which belon to the plaintiff, and that they do not owe the plaintiff an rent.

Now, in the Moonsiff's Court, the plaintiff gave evidence of decree, which was obtained in a suit for rent in the year 1863 That suit was brought by Heera Lall Seal, the predecessor in titl of the plaintiff, against the predecessors in title of the presen defendants, for the rent of these very lands, described precisel as they are described in the plaint in this suit, and, in that suit the plaintiff obtained a decree against the defendants for the rent claimed. There is not the least doubt that, in point of law, tha decree did establish the relationship of landlord and tenant in respect of the lands in question between the plaintiff and the defendants in that suit; and the relationship having once been established, we take it to be clear that it continues as between the parties to that suit and their representatives in title, until it is proved to have ceased.

It is admitted that the defendants in the former suit are the ancestors in title of the present defendants; and, if the latter desire to show that they are no longer the plaintiff's tenants, they

(1) GARTH, *C.J.*, and MCDONELL, *J.*

must explain and prove the reason. The Evidence Act, section 109, confirms what was undoubtedly the previous law upon this subject. That section says: "When the question is, whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it."

Now, it having been established by the decree of 1863, that the relationship of landlord and tenant did exist between the predecessors in title of the parties to that suit, it was for the defendants here, who wished to show that the relationship had ceased, to prove that fact. One means which they took to prove it was this: they showed that Heera Lall Seal, the plaintiff in the suit of 1863, brought another suit some three years afterwards, (in the year 1866,) for the rent of these same lands, against the predecessors in title of the defendants; and those defendants set up, by way of defence, that they had relinquished the lands; and they subpœnaed the plaintiff, Heera Lall Seal, to appear as a witness at the trial. Now it is extremely likely, that a gentleman in the position of Heera Lall Seal, when he was subpœnaed by his own tenants to appear as a witness in a Court of Justice, and knowing that he would probably have an unpleasant time of it there, would rather sacrifice the rent he was claiming than appear in answer to the subpœna; and it certainly appears that he withdrew that suit. But the withdrawal amounted to no more than this, that the plaintiff gave up his claim for the particular rents for which the suit was brought. It in no wise put an end to the relationship of landlord and tenant which was established by the decree of 1863.

The Judge in the Court below appears to have considered that the withdrawal of that suit had the effect, in some way or other, of neutralizing the decree of 1863; but we cannot see how it could have had that effect. Then, again, the learned Judge appears to think that, because no rent was proved to have been received by the present plaintiff or his predecessors since the decree of 1863 was passed, he is entitled to assume that the defendants are tenants of the plaintiff's tenants. But here again we think he

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Judgment.

GARTH, *C.J.*

was clearly wrong. So long as the relationship of landlord and tenant has once been proved, the mere non-payment of rent, though for many years, is not enough to show that the relationship has ceased to exist. The defendant is bound to show that it has ceased by some affirmative proof; and more especially in a case of this kind, where the defendants do not expressly deny that they still continue to hold the lands in question.

It may be, however, that there are some portions of the evidence, which here, in special appeal, we have not had an opportunity of examining or of appreciating at its due weight; and this consideration induces us to send the case back for re-trial, having regard to the foregoing observations. So far as we can see at present, there is no reason why the plaintiff should not be entitled to recover the rent which he claims; but we think it safer on the whole to remand the case for re-trial. The costs will abide the result.

[CRIMINAL REVISIONAL JURISDICTION.]

June 13th.

No. 56 of 1878.

IN THE MATTER OF SHIBO PROSHAD PANDAH. PETITIONER.

Defamation—Good faith—Onus—Indian Penal Code, section 499—Act XVIII of 1862, section 27.

In the mofussil, if an accused person is proved to have committed what *primâ facie* amounts to defamation, the *onus* is on him to show that his case comes within some one or more of the general exceptions to section 499 of the Indian Penal Code.

Semble, that if a man is tried for defamation in the Original Criminal Jurisdiction of the High Court, it will be assumed that he acted in good faith until the contrary is proved. Otherwise in the mofussil.

Act XVIII of 1862, section 27, does not extend to the mofussil Courts. *R.* vs. *Kikabhai Parbhudas*, 9 Bom. H. C. R., 451.

IN this case the petitioner moved the Court to send for the records of a case wherein he had been convicted of defamation by the Magistrate of Cuttack, (whose judgment was affirmed by the Sessions Judge,) on the ground that the conviction was illegal.

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In re SHIBO PROSHAD PANDAH.

Argument.

Branson for the Petitioner. Baboo *Mohendro Lall Mitter*, with him.

Branson.—Though this is a mofussil case, sections 26 and 27 of Act XVIII of 1862 apply. They merely express what is the well-known rule of law, that proof of charges involving bad faith lies on the party making them. No doubt, it has been laid down in *R.* vs. *Mohunt Pursoram Doss*, 2 W. R., Crim., 36, (on review, 3 W. R., Crim. 45,) that the imputation must be made in good faith, but that case is essentially different from the present. There the complainant was charged with having committed a crime and then having others accused of it; besides Act XVIII was not referred to. The next case is *Sealy* vs. *Ram Narain Bose*, 4 W. R., Crim., 22, in which GLOVER, *J.*, does say that Act XVIII does not apply to the mofussil, but he also says that even if it did, "the circumstances from which good faith might be presumed must be proved;" and this is clearly bad law.

Again, what the accused has done here did not amount to defamation—*Brojo Nath Roy* vs. *Kishen Lall Roy*, 5 W. R., 282; *Mohendro Nath Dutt* vs. *Koylash Chunder Dutt*, 6 W. R., 245. In *Greene* vs. *Delanney*, 14 W. R., Crim., 27, the question was one of publication. Act XVIII was not referred to. In that case, also, evidence of want of good faith must have been given, for the Judge found the absence of good faith. In the present case the prosecution gave no evidence of malice.

On the facts of this case, the accused should have been acquitted. It is clear that he believed the statements which were made to him. Neither the Magistrate nor the Sessions Judge said that he did not, and therefore the conviction cannot stand—*Foster* vs. *Perryman*, L. R., 5 H. L., 522.

Counsel also cited *R.* vs. *Kikabhai Parbhudas*, 9 Bom., H. C. R., 451, and *Chatfield* vs. *Comerford*, 4 Fos. and Fin., 1008.

The following judgments were delivered by the Court (1):—

MARKBY, *J.*:— MARKBY, *J*

The defendant in this case has been convicted and sentenced to simple imprisonment for one month by the Joint Magistrate

(1) MARKBY and PRINSEP, *J.J.*

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Judgment.

MARKBY, J.

of Balasore, under section 500 of the Penal Code, for defamation, and he has applied to us to set aside the conviction and sentence as illegal. The defamation charged is contained in a petition to the Magistrate of Balasore, in which the defendant stated that Hur Narain Mohaputtur and others were preparing to bring false charges against him, and it was upon Hur Narain Mohaputtur's complaint, that the allegations in this petition were injurious to his character, that these proceedings were instituted.

The defendant, at the trial, tried to prove that the allegations in the petition were true; and he called several persons who swore that they had heard conversations between Hur Narain Mohaputtur and other persons, in which Hur Narain Mohaputtur had expressed the intention of getting up false charges against the defendant, and that they had reported the conversations to the defendant.

The Joint Magistrate convicted the defendant; but he does not state clearly in his judgment, whether he disbelieved the witnesses when they state that they told the defendant these conversations took place, or only when they state that these conversations did in fact take place; but he finds that the defendant did not act with good faith when he filed the petition.

The Sessions Judge seems to consider that the only question is, whether the defendant acted in good faith when he presented the petition. Upon this point he considers what he calls the "English practice" more consistent with logic or the principles of Criminal Jurisprudence, but thinks that he is barred by a decision reported in 14 W. R., Crim. R., p. 27, from following the English practice. I presume that what the Judge means by the English practice is a presumption that the defendant acted *bonâ fide* until the contrary is proved. I do not think that any Judge, with a reasonable amount of common sense, and apart from any special statutory provisions, would doubt as to what course he ought to pursue in such a case.

The course taken by the defendant, if not a very immoral one, was, at least, one which is not warranted by the law. The imputation made was a very serious one; and it was made in a very public manner. When, therefore, complainant denied upon

or by credible witnesses that the imputation was true, I think, be proper to call upon the defendant to show ad some reasonable ground for making the imputation, showing that the imputation was true, or that, if false, asonable ground for believing it was true, looking to e from which the information was obtained.

: matter has been dealt with by the Legislature, and by ; which are by no means altogether easy to comprehend. l Code contains a chapter relating to what are called xceptions, such as mistake, infancy, lunacy, intoxicaent, the right of private defence, and so forth. Cerons of the Code also contain exceptions, some of which e definition of the crime, and others modify the punishshow that it is not applicable.

st Code of Criminal Procedure provided (section 235) hould not be necessary, in a charge, to allege circumhowing that the case did not come within any of these xceptions; also, that it should not be necessary to en generally, that the case did not come within those s; but that every charge was to be understood to e absence of all such circumstances. By section 237, he section referred to in the charge contains an excepbeing one of such general exceptions, the charge shall nderstood to assume the absence of circumstances ng such exception so contained in the section, without denial of the existence of such circumstances." These , it will be observed in passing, contain rules of only. Whether they would in any way affect the to be adduced in support of the charge, is a question y.

ntly, Act XVIII of 1862 was passed, which proction 26, that, "absence of circumstances, bringing hin the general exceptions under the Penal Code, need ged; but proof of their non-existence may be given or, if accused give evidence of their existence." ovides that, "in indictments for defamation where de under certain exceptions to section 499 of the od faith is to be presumed." These provisions, it

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Judgment.

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will be observed, apply both to pleading and evidence. Apparently, they were only intended to apply to the Supreme Courts.

After this, Act I of 1872, section 105, provided that, "when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case with any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any other law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

The former Code of Criminal Procedure, containing the provisions abovementioned, has been repealed, and the new Code of Criminal Procedure does not contain any analogous provision; but from section 439, illustration (*a*), it may be inferred, that the averment of the absence of all general exceptions is to be assumed, as before, without allegation, and that the averment of the absence of some other exceptions is also to be assumed; but whether this applies to all exceptions is not clearly stated. It affects, however, only the statement of the offence in the charge; and the rule of evidence must, I consider, in the mofussil Courts, be governed entirely by Act I of 1872, section 105.

At first sight, therefore, it would seem that the law upon this subject is directly the reverse in the Presidency towns to that which is in the mofussil, unless the provisions of the Evidence Act over-ride the provisions of Act XVIII of 1862, sections 26, 27. I should very much doubt, that so sweeping a rule, as is contained in section 105 of the Evidence Act, will be found to work well in all cases. But, in the present instance, the law in the Mofussil Courts is, apparently, that which common sense seems to me to teach, namely, that, in a case of this kind, the Court had a right to call upon the party making the imputation to show that he has some reasonable ground for making it.

It appears to me, however, that, in this case, the defendant did show reasonable grounds for making the imputation. He had been long at enmity with Hur Narain Mohaputtur: he had been falsely accused in 1868, and he had left the district. Subsequently, he returned on an assurance from some officer of Government that he would not be molested. He was as

falsely accused in January of this year, and there is reasonable ground for believing that Hur Narain Mohaputtur was connected with all these accusations. Very soon after the last accusation, the defendant presented the petition which is the foundation of these proceedings. The defendant is probably a timid man, and nothing is more likely than these conversations were got up expressly with the object that they might be reported to him, and so frighten him away again from the neighbourhood. That appears to me to be the true point of view from which the case ought to be looked at. The Sessions Judge seems to have looked upon the question before him as one of law; whereas, to my mind, it is one purely of fact.

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Judgment.

MARKBY, *J.*

In my opinion, the judgment of the Sessions Judge is erroneous in law; in that he has not considered the true question which arose for his determination; but I do not think it necessary to send the case back. I have no doubt whatever that the defendant ought to have been acquitted. The conviction and sentence of the Joint Magistrate will be set aside.

PRINSEP, *J.* :—

PRINSEP, *J.*

One Shibo Proshad Pandah appears to have been involved in disputes with his zemindar and some of his own relations, which led to two cases being brought against him in the Criminal Courts. These were dismissed. He then presented a petition to the Joint Magistrate of Balasore, on the 14th December, stating that he had been informed, and had good reason to believe, that his enemies were conspiring together and would shortly bring some false charge of a serious nature against him. It does not appear that this petition was filed with any intention except to give general information to the Magistrate, and it should therefore have been returned by that officer. Hur Narain Mohaputtur, a Mokhtar's Mohurrir, who was one of the persons named in that petition, at once took advantage of his knowledge of the Penal Code, and brought a charge of defamation under section 500. There can be little doubt that the petition does, *prima facie*, amount to defamation as defined in section 499.

The Magistrate, in dealing with this case, required the accused to prove his allegations that the imputations were true; and, find-

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Judgment.

PRINSEP, *J.*

ing that he had failed, not only in this but also in proving "good faith," so as to bring himself within exceptions 8 and 9 to section 499 of the Indian Penal Code, the Magistrate convicted the accused and sentenced him to simple imprisonment for two months, and to a fine of Rs. 50, or, in default of payment, to imprisonment for another month. The Sessions Judge of Cuttack dismissed the appeal, holding that the accused had failed to prove "good faith" so as to get the benefit of exceptions 8 and 9, and agreeing with the Magistrate in thinking the evidence of the witnesses for the defence false.

Mr. Branson, who appears before us sitting as a Court of Revision, contends that, as laid down in Act XVIII of 1862, section 27, "good faith" should have been presumed unless the contrary appeared; and, next, that neither the Magistrate nor the Sessions Judge had considered whether the accused had been informed by his witnesses, persons of respectability, of this conspiracy against him, and so had good reason for believing that information; but that they had, rather, only considered whether these witnesses had themselves heard the use of threats of injury to the accused. In order to understand rightly the first objection, it is necessary to consider the course of legislation. The Penal Code (Act XLV of 1860) has, since the 1st January 1861, been law throughout British India, and applies equally to Presidency Towns within the jurisdiction of the Supreme Courts and of the High Courts in their Original Criminal Jurisdiction, as in Mofussil Courts without that jurisdiction. At the same time Act XXV of 1861 prescribed a Criminal Procedure for all Courts except those in Presidency Towns. The Penal Code contains a chapter of general exceptions to offences (Chapter IV), and for certain offences (one of which is defamation) special exceptions were provided. The Code of Criminal Procedure made special provision for these exceptions, and for the burden of proof to establish any of them. The effect of sections 235, 237 was, that it was for an accused person to establish the existence of any of the general exceptions, while section 237 provided that if the charge denied the existence of any of the special exceptions to an offence, the absence of circumstances constituting the exception was to be assumed. This was the state of the

the Presidency Towns until the Evidence Act I of 1872, Code of Criminal Procedure of 1872, were passed, when 235, 237, were repealed with the rest of the former d in their place section 105 of the Evidence Act was which threw the burden of proof on the accused, to existence of any general or special exception.

XVIII of 1862, which came in force on the 1st of May ear, laid down the procedure on several points for High the exercise of Original Criminal Jurisdiction, and sec- f that Act laid down a rule similar to that contained in 235, 237 of the Code of Criminal Procedure of 1861; ion 27 declared that "on proving the existence of cir- es to a defence under the 2nd, 3rd, 5th, 6th, 7th, 8th, 0th exception to section 499 of the Indian Penal Code, h shall be presumed unless the contrary appears."

remarkable that, though the greater portion of Act f 1862 was repealed by Act I of 1872, and though sec- of Act XVIII is identical with section 105 of the Evi- t of 1872, yet both section 26 and section 27 still aw. Act XVIII of 1862 was passed, so its preamble , "pending the preparation of a Code of Criminal Pro- or Her Majesty's Supreme Courts of Judicature," and it applies only to such Courts. The provision contained 27 does not extend to Mofussil Courts, and I am not to concede that what is express law for one set of must necessarily be the law for another set. For some other, the Legislature thought proper to make this pro- the Supreme Courts—or what are now the High Courts, exercise of their Original Criminal Jurisdiction; but it that this is not the law elsewhere in British India. I that this has been so held by the Bombay High Court of *Reg.* vs. *Kikabhai Paibhadas,* 9 Bom. H. C. R.,

tion then remains, has the accused shown that he good faith, that is to say, with due care or attention, Indian Penal Code,) in making that petition to the It appears to me that this point has not been pro- ther by the Magistrate or by the Sessions Judge on

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Judgment.

PRINSEP, *J.*

appeal. The Magistrate confined his attention to deter
whether the allegation of conspiracy was true, instead of
whether the accused was told of it by his witnesses, and
quently had good reason to believe that it was true; unl
are to understand from his judgment that, because the
trate did not believe the statements of the witnesses as
existence of the conspiracy, the accused could have no su
reason for believing them, and, therefore, that he did not
good faith, *i.e.*, with due care and attention, in believi
statements made by those persons. I do not think that I
be justified in placing this construction on the Magi
judgment. The Sessions Judge seems to have indulged
in theoretical speculations instead of applying himself to
sideration of pure questions of fact, and, in the latter
of his judgment, he briefly endorses the conclusions
Magistrate.

For those reasons I am of opinion that the convictio
sentence, as they stand, cannot be maintained; and that t
question at issue has never been tried; but I do not thin
it is necessary that this trial should be continued, since th
seem to me to show that the accused, a comparatively ig
and timid man, has been much harassed by the complainant
case, (a Mokhtar's clerk,) and others of superior intelligen
knowledge of the law; and, though he would seem to hav
in a somewhat unusual manner in presenting this petition
Magistrate, I have little doubt that he acted with a de
protect himself by an appeal to the Magistrate, rather
injure others; and I would remark that the Magistrate
have acted more properly had he refused to take the
which has given rise to the present proceedings. I th
agree in setting aside the conviction and sentence.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF JOJA PASHAN . . . . . PETITIONER.

1878
July 8th.

No. 113
of 1878.

Retrial—Acquittal—Failure of Justice—Code of Criminal Procedure, sections 220, 216—*Charge—Preparing a charge.*

A man accused of theft was acquitted by the Deputy Magistrate under section 220 of the Code of Criminal Procedure. The District Magistrate, at the instance of the Police, ordered the case to be retried. It appeared that the Deputy Magistrate had not framed any charge, but that no failure of justice had been occasioned by his not doing so.

Held, that the Magistrate had no power to order a retrial, without first setting aside the order of acquittal; and that he had no power to set aside the order of acquittal as the case had not been appealed to him.

THIS was a motion on a petition by one Joja Pashan, praying that an order passed by the Magistrate of Monghyr, directing him to be retried after acquittal, might be quashed. The facts appear in the judgment of the High Court (1), which was delivered by

AINSLIE, *J.*:— AINSLIE, *J.*

Joja Pashan was charged by one Sham Saha with house-breaking and theft. The charge was tried by the Deputy Magistrate of Monghyr. On the 28th of May, Sham Saha and other persons were examined for the prosecution. On the [illegible] of May, the prisoner was examined. The first question put to him was, whether he had cut a hole in the house of the prosecutor and stolen therefrom certain property. He denied having done so. He was further examined at considerable length, and he stated certain facts, which, if they could be proved, would exonerate him from the charge of burglary and theft; and he wound up by giving the names of the persons who could prove those facts, he having been specially asked whether

(1) AINSLIE and BROUGHTON, *J.J.*

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In re
Jona Pagham.

Judgment.

Ainslie, J.

he had any witnesses to prove them. I have not found the order for the summoning of the witnesses for the defence; but it appears that, on the 31st of May, a summons was issued, and on the 5th of June, two of the witnesses named by the accused were examined. On the 7th of June, the Deputy Magistrate recorded his judgment, in which he came to the conclusion that the charge against the accused was wilfully false; and he concluded in these words:—"His" (that is, the accused's) "witnesses support his plea. I must dismiss the case, acquit the accused under section 220 of the Procedure Code, and give permission to the accused for prosecuting the complainant for bringing a false charge of theft against him." After this, the Magistrate of the district having been moved by the local Police authorities, directed that the accused should be retried. The accused person has come up to this Court by motion, protesting against that order, and asking the Court to set it aside as illegal, on the ground that, there having been an acquittal, it was not within the competence of the Magistrate to direct any further proceedings.

It appears to us that the order of the Magistrate is wrong. There can be no doubt that the intention of the Deputy Magistrate was not merely to discharge the accused on the ground that there was not sufficient evidence for framing a charge against him, but to acquit him finally; and he cites section 220 of the Procedure Code which provides for a final order after a complete trial. His giving permission to the accused to bring a counter-prosecution for a false charge of theft also shows that he did not merely mean to say that the case for the prosecution had not been established, but that it was a false case, and that the prisoner was not guilty in any sense.

The only ground upon which it is possible to support the Magistrate's order is, that the Deputy Magistrate failed to draw up a charge; and that, therefore, he was not in a position to pass any judgment of acquittal. The explanation under section 220 no doubt says that, "if no charge is drawn up, there can be no judgment of acquittal or conviction," but it goes on to say "except in the case provided for in explanation I to section 21[illegible]" and that explanation is in the following words: "The omission

to prepare a charge shall not invalidate the trial, if, in the opinion of the Court of Appeal or Revision, no failure of justice has been occasioned thereby." In order to show that there has been no valid acquittal, in consequence of the absence of the formal charge in writing, it is necessary to show that the absence of such charge has been in itself the cause of failure of justice, the words of the explanation being, not that "no failure of justice has occurred," but that it has not been "occasioned thereby."

It is quite clear that in the present case it is impossible to say that there was any failure of justice caused by the absence of a charge in writing. It may of course be that the prosecution could have adduced further evidence if it had been thought necessary, but it is not shown to us that any evidence was tendered to the Court and refused. The whole case for the prosecution which they intended to bring before the Court was closed. The accused person was then called upon to enter upon his defence and to produce his witnesses, and he did do so. The trial was in every respect complete, excepting the absence of one particular paper. Had that formal charge been drawn up and annexed to the record, it does not appear that any steps would have been taken in this trial by the Deputy Magistrate other than those which were actually taken. It is, therefore, quite evident that no failure of justice was caused by the absence of a charge in writing.

The junior Government Pleader contended that the question whether there was a failure of justice or not is one which we are not to enquire into; and that it was within the competence of the Magistrate to determine this point. It seems to us that there is no foundation for such a contention. When a charge is dismissed by a Subordinate Magistrate, the District Magistrate may, under certain circumstances, proceed under section 142; but it is quite clear that he cannot do so where there has been a formal acquittal. The terms of section 460 bar any further trial so long as that acquittal remains in force; and that acquittal could not be set aside by the Magistrate unless he could deal with the case as a Court of Appeal. But there was no appeal before him, and therefore he was not at liberty to set aside the

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acquittal, and that acquittal standing, he was not at liberty to take any steps whatever himself. We therefore think that the order of the Magistrate directing a retrial, and all proceedings taken thereunder, must be quashed, and the accused, if arrested, must be discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

July 22nd.

No. 134 of 1878.

IN THE MATTER OF BAIKUNT KUMAR AND OTHERS . . . . . } PETITIONERS.

Possession—Magistrate's inquiry—Code of Criminal Procedure, sections 530, 533—Local inquiry—Report.

In a proceeding under section 530 of the Code of Criminal Procedure, the Magistrate must decide the fact of possession on evidence taken by himself, and not according to the result of a local inquiry made under section 533, unless the parties have consented to be bound thereby.

Per PRINSEP, *J.*—The local enquiry referred to in section 533 should be restricted solely to some question relating to the features of the property about which the dispute has arisen; and should not be directed to any matter which can be proved before the Magistrate by oral evidence.

CRIMINAL REFERENCE from the Magistrate of Burdwan, in a proceeding under section 530 of the Code of Criminal Procedure.

Mr. *R. E. Twidale*, for the Petitioners.
Baboo *Saroda Churn Mitter*, for the Opposite Party.

The following judgments were delivered by the High Court (1) on the reference submitted :—

WHITE, *J.* :—

In this case, the Officiating Joint Magistrate inquired, under section 530 of the Criminal Procedure Code, into the possession of a tank, to which there were two rival claimants. The

(1) WHITE and PRINSEP, *J.J.*

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In re BAIKUNT KUMAR.

Judgment.

WHITE, *J.*

Magistrate took no evidence before himself on the question of possession, but he made use of a report furnished by an officer whom he had, under section 533, deputed to make an inquiry. Now, having regard to the latter clause of the explanation in section 530, which directs that the question of possession should be decided on the evidence taken before the Magistrate, it is a matter of some doubt whether a Magistrate could, upon the question of possession, direct a local inquiry under section 533; but that difficulty is got over in this case, because both parties assented to a local inquiry being made. The error which the Magistrate has made in this case consists in his holding, that because the parties assented to such an inquiry taking place, they must abide by the result of that inquiry, and upon that footing making the order which is now sought to be set aside.

We have had the petition read upon which the local inquiry was directed. It was drawn up by the parties for whom Mr. Twidale appears. The present applicants wrote on the margin of the petition that they assented to the local inquiry, but there is nothing in the language which they use to show that they consented to abide by the result of that inquiry. The consequence is, that the order of the Magistrate cannot stand. We, therefore, set it aside and direct the Magistrate to proceed anew with the inquiry, taking before himself the evidence of the rival claimants and their witnesses on the question of possession.

PRINSEP, *J.*

PRINSEP, *J.* :—

The question raised in this case is whether any, and if so what, effect is to be given to the report of the Subordinate Magistrate who was deputed to make a local inquiry under section 533 of the Criminal Procedure Code, and who, after recording the evidence of some witnesses, has submitted a report as to the question of possession. The objection raised is, that the Superior Magistrate, who instituted the proceedings under section 530, was bound to decide the question of possession on the evidence taken before himself, and that he erroneously acted in this case solely upon the evidence taken before the Subordinate Magistrate. Section 533 is a provision which appeared for the

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In re BAIKUNT KUMAR.

Judgment.

PRINSEP, *J.*

first time in the present Code of Criminal Procedure. To me it appears that the local inquiry to which it refers should be restricted solely to some question relating to the feature of property about which the dispute has arisen, and that it should not be directed to any matter which can be proved before the Magistrate by oral evidence, such as the question of actual possession. There is nothing in the Code which declares that the evidence which is taken in the course of that inquiry shall be evidence in the case, but on the contrary the terms of the explanation to section 530 expressly provide that the Magistrate who institutes the case may satisfy himself, as to the existence of the dispute likely to induce a breach of the peace, from the report or other information, but that the question of possession must be decided on evidence taken before him. There is nothing in section 533 which declares that the evidence taken in the course of the local inquiry shall be evidence in the case such as there is in the Code of Civil Procedure relating to evidence taken by Commissioners or Ameens. Therefore, I am inclined to think that the scope of a local inquiry under section 533 is extremely limited, and that the Magistrate's instructions must, as stated in that section, be consistent with the law for the time being in force; that is to say, they are not to relate to any question of possession, which must be decided solely upon the evidence taken before himself. Of course, I do not mean to say that, in a case of this kind, which is somewhat of the nature of a civil suit, where both parties agree that evidence may be taken by a Subordinate Magistrate, and that they will abide by the result of such an inquiry, the decision of such a matter may not depend upon the result of the evidence so taken; but that is not so in the present case.

[REVISION.]

ROGHONUNDUN LALL . . . . . PETITIONER;

AND

MOHESH LALL AND OTHERS . . . . . OPPOSITE PARTIES.

1878
June 20th.

No. 372 of 1878.

Charter Act, section 15—High Courts' Act—Error of Law—False Statement—Pending Proceedings.

The High Court will interfere under section 15 of the Charter Act, with an order made by a lower Court, which is merely contrary to law, when that order has been passed in consequence of a wilfully false statement made by the opposite party.

Proceedings held to be pending when the new Code of Civil Procedure came into force.

RULE to show cause why an order, passed by the District Judge of Patna, should not be set aside by the High Court under the provision of section 15 of the Charter Act, 24 and 25 Vict., c. 104.

Palit, for the Petitioner. Baboo *Pran Nath Pundit* with him.

Baboo *Aubinash Chunder Banerjee*, for Opposite Parties.

The facts of the case are sufficiently set forth in the judgment of High Court, (1) which is as follows :—

In this case, we think that the rules ought to be made absolute with costs. The petitioner obtained two money-decrees on the 27th March 1874, against the judgment-debtor, in the District Court of Tirhoot. The judgment-debtor having no property within the jurisdiction of that Court, a certificate of non-satisfaction was obtained, and the decrees were executed in the district of Patna. Certain properties of the judgment-debtor were caused to be attached in the district of Patna, on the 30th of April 1876, and on the 12th of August 1876.

(1) MITTER and MACLEAN, *J.J.*

1878

ROGHONUNDUN LALL v. MOHESH LALL.

Judgment.

It appears that the opposite party similarly held a money-decree against the same judgment-debtor in the District Court of Bhaugulpore. This decree was also sent to the Patna Court for execution, and Mohesh Lall caused the same identical properties to be attached on the 23rd October 1876.

After these attachments, the properties attached were not brought to sale on account of an objection preferred by a third party claiming them as his. This claim became subsequently the subject-matter of a regular suit between the claimant and the petitioner before us, Roghonundun Lall. This regular suit was decided on the 29th June 1877 against the claimant, it having been found that the properties in dispute belonged to the judgment-debtor.

Upon that the properties were sold on the 15th August 1877 for Rs. 6,750. On the 22nd September 1877, the petitioner before us, Roghonundun Lall, applied to the Judge to have the whole amount covered by his two decrees first paid out of the sale proceeds of the property, on the ground that his attachments were prior in date. This application was opposed by Mohesh Lall upon the ground that the decree in the suit between the claimant and Roghonundun Lall, dated the 29th June 1877, was pending in appeal in the High Court. The Judge, either on the 5th October 1877, or on the 5th December of that year (it is quite immaterial which of these dates is the correct one), refused the prayer of Roghonundun Lall, made in his application of the 22nd September, on the ground that the decree in the claim case was pending appeal. Then on the 7th December 1877, a fresh application was made by Roghonundun Lall, stating that the decree of the 29th June 1877 had never been appealed against. The District Judge on this application has held that the case must be governed by the new Procedure Code, and under section 295, Act X of 1877, he has ordered that the sale proceeds should be divided between the decree-holders *pro rata*.

Roghonundun Lall has made this application under section 15 of the Charter Act, to set aside the order of the lower Court. The opposite party, in showing cause, first of all contends that in this case this Court ought not to interfere with the order of the lower Court, under section 15 of the Charter Act, because all the

has been made out is, that there is an error of law in the proceedings of the lower Court, and he contends that this Court has always refused to interfere under the law above cited, simply on the ground that the order complained against is contrary to law. It is true that this contention is, to a certain extent, correct. This Court has generally refused to interfere with orders of a lower Court under section 15 of the Charter Act, upon the bare ground of an error of law; but the present case is quite distinguishable from the cases referred. In this case, the opposite party by his misstatement misled the lower Court into rejecting the application of the 22nd September 1877. If that misstatement had not been made, there is no doubt that the order of the lower Court would have been in favour of the applicant Roghonundun Lall. We are, therefore, of opinion that this application is not simply upon the bare ground of an error of law in the order of the lower Court; but the opposite party having misled the lower Court, in the interest of justice we think we should interfere in this case under the provisions of section 15 of the Charter Act.

Then the next question is, whether the lower Court's order is erroneous? We think that the application for the distribution of the sale proceeds having been made originally on the 22nd September 1877, the proceedings must be considered to have commenced with that application, and they were therefore pending proceedings when the new Code of Procedure came into force. By virtue of section 6, Act I of 1868, we think that the old Procedure law was applicable; and it is quite clear that under section 270 of the old Code, the right of the petitioner, Roghonundun Lall, to have the whole amount of his decrees first satisfied, is undoubted.

The order of the lower Court is set aside, and the petitioner, Roghonundun Lall, will be declared entitled to have the whole of his decrees first satisfied out of the sale proceeds. We, therefore, make these rules absolute with costs.

[PRIVY COUNCIL.]

1878
May 29th.

JARDINE, SKINNER & Co. . . . . DEFENDANTS;

AND

RANI SURUT SOONDARI DEBI . . . . PLAINTIFF.

Ijara—Term of years—Renewal of Lease—Right of Occupancy.

A right of occupancy may be acquired in respect of an undivided share of an estate.

Plaintiff re-let certain lands in *ijara* to defendants for a term of five years, from the 12th of April 1865 to the 12th of April 1870. The pottah contained a clause of renewal on the expiration of the term, and a stipulation that the defendants should accept the renewed pottah and give a kabulyat within two months after fixing the rates. After the expiration of the lease the defendants continued in possession, and on the 28th of December 1872, plaintiff issued a notice, calling on the defendants to take the renewed lease at rates mentioned in the notice, and within two months from the date thereof. The plaintiffs refused to take the lease on the ground that the rates were too high; and on the 25th of August 1874 plaintiff brought a suit for possession of the land.

Held, affirming the judgment of the High Court, that plaintiff had a right to turn the defendants out of possession at the expiration of the term granted by the lease of 1865, except so far as that right was qualified by the stipulation for a renewal; that the defendants at the expiration of that lease had an equitable right to a renewal according to the stipulations in the agreement; that although the defendants were not bound to accept the renewal, if the rent at which the plaintiff offered it were too high, yet in that case it lay upon them to take measures to compel the plaintiff to renew at a proper rate; that the defendants could not compel a renewal of the lease for more than five years, the original term; and that it was too late to rely upon a right of renewal at a time when, if it had been granted, the renewed lease would have expired.

APPEAL from a decree passed by the High Court of Judicature at Calcutta (JACKSON and MCDONELL, *J.J.*), reversing that of the Judge of Burdwan. The facts of the case are sufficiently set forth in the judgment of the High Court, (w

will be found reported in 25 W. R., 347,) and in the following judgment of the Privy Council (1) :—

The appellants in this case are Messrs. Jardine, Skinner and Company. They were the defendants in a suit brought against them by Rani Surut Soondari Debi, to recover possession of a 2-annas 15-gundas share of upwards of 20,000 bighas of chur land.

The question is, whether the plaintiff was entitled, at the time when she commenced her suit, to treat as trespassers the defendants who had unquestionably held as ijaradars under her. The ijara was dated the 12th Jeyt 1272, corresponding with the year 1865, and was to continue for a term of five years. It comprised a large quantity of land, besides the chur land now in dispute. As to the latter, the kabulyat executed by the defendant's agent, contained the following stipulation : " Having fixed a yearly rent of Rs. 609-4 for your *nij* share of 20,950 bighas, describing them as per boundaries given in the schedule below, you have included it in the aforesaid ijara rent of Rs. 4,417-9-5. I shall be in possession of the said chur as a jote. Upon the expiration of the term of the ijara of the said mehals, a pottah and a kabulyat will be respectively given and taken in respect of the jote, regard being had to the quantity of land and amount of rent that shall be determined to belong to your *nij* share in accordance with the productive power of the land within the area determined by a measurement of the said chur. If I do not take a pottah and give a kabulyat within two months after the fixing of the rate of that land, you will make a settlement with others." In other words, the defendants were to be entitled, at the expiration of the term of five years, to a renewal of the lease of the land in dispute at a rent to be fixed according to the measurement of the land to be made at that time, and to the productive powers of the land.

The defendants at the expiration of the lease continued in possession. Nothing was done with regard to assessing the rent for the new lease for nearly three years afterwards, but the defendants remained in possession, and continued to pay the

(1) Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH and Sir ROBERT P. COLLIER.

[illegible] having apparently refuse [illegible] the plaintiff caused a notice t[illegible] [illegible] That notice, after referring to [illegible] kabuliyat, and stating th[illegible] [illegible] the said land assessing the [illegible] the rate being fixe[illegible] [illegible] powers of the various sort[illegible] [illegible] the rate paid by tenants [illegible] similar description, proceeded [illegible] [illegible] repeatedly given to you requi[illegible] [illegible] kabuliyat, but you have, notwithsta[illegible] [illegible] any settlement. For this re[illegible] [illegible] means of this notice that in acc[illegible] [illegible] the kabuliyat, dated 14th Jeyt 1[illegible] [illegible] you shall appear personally or through y[illegible] [illegible] person, within two months f[illegible] [illegible] of this notice at Putia, the Sud[illegible] [illegible] and appertaining to Zillah Rajshal[illegible] [illegible] the rent mentioned in this not[illegible] [illegible] If you do not do this within the said per[illegible] after its expiration a settlement will be made with othe[illegible] There is no proof of the former notices mentioned in this do[illegible] ment. For all that appears from the evidence, this was first notice served upon the defendants. Some further co[illegible] spondence took place, but nothing was settled between the part[illegible] and the plaintiff filed her plaint in August 1874. The defend[illegible] insisted, that by reason of a long occupation of the lands they acquired a right of occupancy, and that the plaintiff had right to turn them out of possession. In paragraph 2 of t[illegible] written statement they say: "The lands in dispute have b[illegible] held by us in jote right for upwards of 12 years since their fo[illegible] ation, and the plaintiff therefore included the said jote in pottah of 12th Jeyt 1272, and realised rent accordingly. [illegible] rents of the years 1277, 1278, 1279, and 1280 have been posited by us in the Moonsiff's Court at Jungipore. We h[illegible] acquired the right of occupancy in the plaintiff's share of said lands, and possess a legal right to hold and enjoy same on payment of a rental of Rs. 609-4 per year." T[illegible]

claimed, therefore, a right of occupancy acquired by virtue of the provisions of Act VIII of 1869 of the Bengal Government, or under Act X of 1859, of the Governor-General in Council.

With reference to this claim the Judge of the Court of First Instance laid down two issues, the 4th and 5th, which are: "Was there a jotedar holding by defendants of plaintiff's share antecedent to, independent of, and not merged in the interest conferred by the ijara lease? If there were such a jotedar holding, has it ripened into a right of occupancy?" In his judgment at page 97 he says: "I find that the defendants had a jotedary tenure antecedent to the ijara lease, aud not merged therein; but that this tenure has not been shown to have been strengthened by the acquisition of a right of occupancy in the lands included therein." As their Lordships understand, the learned Judge in this part of his judgment has held that there was a jotedary holding, but that the defendants had not gained a right of occupancy which entitled them to hold possession as against the plaintiff, independently of the stipulation in the ijara.

The High Court put their conclusions on the above issues far more clearly. They say: "At any rate it seems an irresistible conclusion that the occupancy of the defendants in these lands was connected with, and arose entirely out of, their tenure as zamindars of the Pergunnah. That being so, the case falls under the repeated decisions of this Court, that no farmer or lease-holder can, during the term of his lease, create for himself a sub-tenure which is to ensure after the lease expires, to the prejudice of the owner whose *locum tenens* he is during the term of his lease. But even if that were not so, it is impossible to see how the defendants could have acquired either a right of occupancy, or a jotedar right in respect of an undivided share of an estate."

Their Lordships do not concur in the view thus expressed by the High Court, to the effect that a right of occupancy cannot be acquired in respect of an undivided share of an estate; but they fully concur in the conclusion that the defendants, holding as zamindars prior to and during the lease of 1865, did not create for themselves a right of occupancy, and that after the expiration of

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JARDINE, SKINNER & Co. v. RAJI SURUT SOONDARI DEBI.

Judgment.

the lease of 1865, they held over, subject to the terms of tl lease.

They are also clearly of opinion, that in point of law t agreement contained in the pottah to grant a renewal of t lease did not create or vest in the defendants a fresh term years. It merely gave them a right to a renewal of the lea and to compel the plaintiff to renew it if she should attempt turn them out of possession at the expiration of the term. It al gave the plaintiff a right to the land, and to let it to oth if the defendants should refuse to accept a pottah and execu a kabulyat within two months after the rent to be paid duri the renewed term should have been duly ascertained and fix Accordingly, when, after the expiration of the lease, and befo the defendants acquired a right of occupancy, the plaintiff ga them notice that, unless they renewed the lease according to t terms which she pointed out, she would settle with others, or other words that she would turn them out of possession, tl defendants might if they had pleased have required the plaint to perform her agreement, and to grant them a lease upon tl terms stipulated; but even if they had done so, they could n in their Lordships' opinion, have compelled her to grant a lea for a longer period than five years. Nothing is said in t ijara as to the duration of the new lease, and a term for a long period than the original term could not reasonably be impli The defendants, however, took no measures to obtain a renewal the lease, and at the present moment, the period of five years fr the expiration of the lease of 1865 has expired. The Judg of the High Court says: "She waited for three years after t expiry of the ijara lease before she gave notice to the defendan and allowed the defendants to occupy at the old rate, which w very much less than what was now demanded. After that s waited for two years more before she brought the present sui and finally about six or seven years have now elapsed since t termination of the ijara, and the defendants are still holding the rate of Rs. 609, that which the plaintiff claims to be wo Rs. 4,000. Having regard simply to this circumstance, appears to us that the defendants had already had the full be fit which they could have derived from the stipulation in t

ijara pottah. They could not have required the plaintiff to give them the land for more than five years, nor could they have expected to hold the land at anything like so favourable a rent as that at which they have been so long enjoying." Their Lordships are of opinion that the plaintiff had no right to measure the lands in the absence of the defendants, or herself to determine finally the rent at which the lease should be renewed. If the rent at which the plaintiff offered to renew the lease were too high, the defendants were not bound to accept it; but in that case it lay upon them to take measures to compel the plaintiff to renew at a proper rate, having regard to the stipulations of the lease. This they did not do at the time before the commencement of the suit otherwise than by stating, in a letter of the 4th November 1873, their readiness to accept a renewal at the rent to be fixed in accordance with the terms stipulated. Even in their defence to the suit, though they stated that they were ready to take a pottah upon the terms stipulated, they still, as already stated, set up a right of occupancy at the rent of Rs. 609 and 4 annas a year. It appears that a great portion of the land has been diluviated, and it would be impossible now to measure the land as it existed at the time of the expiration of the lease, or to ascertain what were the productive powers of the land at that time.

Their Lordships are of opinion that the plaintiff had a right to turn the defendants out of possession at the expiration of the term granted by the lease of 1865, except so far as that right was qualified by the stipulation for a renewal; that the defendants at the expiration of that lease had an equitable right to a renewal according to the stipulations in the agreement; but that it is too late for them to rely upon their title to a renewal of the lease which, if it had been granted, would now have expired. They have, therefore, no equity to resist the plaintiff's claim to recover the possession of the land.

Under these circumstances their Lordships are of opinion that the decree of the High Court ought to be affirmed, and they will humbly advise Her Majesty to that effect. The appellants must pay the costs of this appeal.

[CIVIL APPELLATE JURISDICTION.]

1878
June 7th.

WOOMA CHURN CHATTERJEE . . . . DEFENDANT;

AND

KADAMBINI DABEE . . . . . PLAINTIFF.

Execution of Decree—Transferable Tenure—Arrears of Rent—Act VIII of 1859, section 246—Act VIII (B.C.) of 1869, section 63.

A, the lessee of a transferable tenure, transferred his interest to B, but after the transfer, the name of A remained as registered tenant. Subsequently the zemindar brought a suit against A for arrears of rent which accrued due partly before and partly after the purchase, and obtained a decree for the sale of the tenure. *Held*, that that decree might be executed against the tenure, though the latter was in B's possession before it was passed, it not appearing that the zemindar had knowledge of the transfer before the date of the decree.

A suit will lie to set aside an order passed under section 63 of Act VIII (B.C.) of 1869.

Where property has been released from attachment in execution of a decree, and in a subsequent suit brought for the purpose, a decree is obtained declaring it liable to be attached and sold in execution of the former decree, the effect of the decree in the latter suit is to set aside the order which released the property from attachment, thus leaving matters as they were before that order was passed.

Sheik Afzul Ali vs. *Lalla Gurnarain*, 6 W. R., Act X, 59; *Urjoon Sahoy* vs. *Nilmony Singh*, 20 W. R., 90; *Nobin Chunder Sen* vs. *Nobin Chunder Chuckerbutty*, 22 W. R., 46; cited.

SPECIAL APPEAL from a decree passed by the Additional Judge of the 24-Pergunnahs, reversing that of the Second Moonsiff of Baraset.

The facts of the case are sufficiently set forth in the judgment appealed from, which is as follows:—

"In this case, one Nepal Mandal held a transferable tenure which he sold to the defendants in 1278. They did not have their names registered, and in April 1874 they sued the plaintiff to register their names. It is admitted that in the meanwhile

time, in April 1873, the plaintiff obtained a decree against Nepal for the arrears of 1277 to Pous 1279, and on the 20th of January 1876 proceeded regularly to attach and sell the tenure for which the arrears were due. Defendants objected under section 63 of Act VIII of 1859, and succeeded in getting the property released, and hence this suit to declare the property liable to sale.

"The Moonsiff dismissed the suit. He held that the tenure was not liable to sale for a decree against Nepal; and, further, that the decree was barred. After a careful perusal of the Moonsiff's judgment, I regret that I cannot agree with it. As regards the point of limitation, the decision at 6 W. R., Act X, 84—*Heeralall Seal* vs. *Poran Matteah* is decisive that, plaintiff having filed her application within three years, execution must issue; and, if she succeeds in this case, she will not re-execute the decree, but proceed with the execution as it stood on the 13th of May 1876, the date of the order releasing the property.

"Then, is the tenure liable to sale for its own arrears? I think the law is quite clear on that point, and indeed I do not see how it could be contested. I, therefore, reverse the decision of the Moonsiff and decree the suit with costs, bearing interest at 6 per cent."

The defendant appealed specially to the High Court on the following ground: *First*, that the learned Judge should have held that under section 58, Act VIII (B.C.) of 1869, the decree dated the 8th of April 1873, is barred by limitation; *second*, that the Judge has erred in holding that the execution case of 1876 is still pending. At any rate he should have held that no such process can now issue on the said decree after the lapse of three years from the date thereof; *third*, that the lower courts should have held that the present suit would not lie for a declaration in direct opposition to the order, dated the 13th of May 1876; *fourth*, that the learned Judge has erred in holding that the plaintiff has a lien on the tenure for the realization of the amount due under the aforesaid decree.

Babu *Bhobani Churn Dutt*, for the Appellant.

Babu *Aubinash Chunder Banerjee*, for the Respondent.

1878

WOOMA CHURN CHATTERJEE v. KALAMONI DASSEE.

Judgment.

PRINSEP, J.

The following judgments were delivered by the Hig Court (1):—

PRINSEP, J.:—

In this case the plaintiff is the zemindar, and the tenure wa originally held by one Nepal Mandal. It has been found be yond doubt that the tenure is a transferable tenure, and that has since passed into the hands of the Chatterjees, who are th defendants in the present case. The Chatterjees stated that the bought this tenure from Nepal Mandal on the 27th Noven ber 1871. The plaintiff zemindar obtained a decree for arrea of rent on the 8th April 1873 against Nepal Mandal. The ren which was then decreed was due partly before the alleged tran fer to the Chatterjees, and partly after. In April 1874, th Chatterjees sued the zemindar for registration of their unde tenure, and ultimately obtained a decree in February 1875. Not withstanding this, the plaintiff took out execution of her decre against Nepal Mandal, and was about to sell the under-tenur when the Chatterjees interposed; and, on the 13th May 187 obtained an order exempting the tenure from sale. The plai tiff now sues to obtain an order, declaring that that tenure i liable to sale in execution of her decree against Nepal Manda The lower Appellate Court set aside the Moonsiff's order di missing the suit, and held, that as regards limitation executio of the decree would not be barred, and, further, that the tenu was liable to sale inasmuch as there were arrears due on it.

In special appeal it is first argued that this suit would not l to set aside an order passed under section 63 of the Rent La of 1869. At first sight I was inclined to think that there w a good deal in this objection; but, looking more closely into t law, I am clear that section 63 of the Rent Law must be re with section 246 of Act VIII of 1859, because section 63 of t Rent Law merely lays down certain points that the Court shou consider in determining the objection to the sale of an und tenure. It nowhere declares the nature of the order th should finally be passed upon such a claim. Therefore clea

(1) McDONELL and PRINSEP, J.J.

the order that should be passed on such a claim must be passed under section 246 of Act VIII of 1859. Now under Act VIII of 1859 it is open to the party affected by such an order, to bring a suit to establish his right. The plaintiff, therefore, is entitled to bring the present suit. I would next remark that the decision of the Full Bench in the 6th W. R., p., 59, Act X rulings—*Sheik Afzul Ali* vs. *Lalla Gurnarain*, which has been cited in the argument, proceeds under Act X of 1859, section 107 of which distinctly provided for the bringing of a suit. Act X of 1859 has now been generally repealed and has been replaced by the present Rent Law of 1869, which contains no section corresponding to section 107. This is probably explained by the fact that rent suits are now tried by Civil Courts whose proceedings are regulated by the Code of Civil Procedure, and this confirms the view that I have taken that section 63 of the present Rent Law should be read with section 246 of Act VIII of 1859. A similar observation applies to the judgment reported in 20 W. R., p. 90—*Urjoon Sahoy* vs. *Nilmony Singh*, which was also under Act X of 1859.

The next objection taken is, that the plaintiff has no lien on the tenure. Without going so far as to say that a tenure is always hypothecated for all arrears due on it, it is perfectly clear to me in the present case that the defendants' tenure is liable for the present arrears. It is not shown that the plaintiff was aware of the transfer to the present defendants, and even if she were aware of such a transfer, it has been held in the case reported in 22 W. R., p. 46—*Nobin Chunder Sen* vs. *Nobin Chunder Chuckerbutiy*, that the mere knowledge of transfer is not sufficient to bind the zemindar unless he has acknowledged the transferee as his tenant, or unless registration has been effected, or some sufficient reason shown for non-registration. The present defendants admit that a considerable portion of the amount covered by the decree is due during their tenancy. At any rate they nowhere deny that such rent is due, and they have not shown that they applied for registration, or that registration was, for no sufficient cause, refused to them between the time of their acquiring title by purchase from Nepal Mandal, and the date of the passing of the decree; nor have they shown

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Judgment.

PRINSEP, *J.*

that the zemindar had at any time acknowledged their tenancy The fact that in April 1874 the Chatterjees, defendants, brought a suit against the zemindar to compel registration, does not show at what time their cause of action accrued by the refusal of the zemindar, and I remark that that suit was brought one year after the decree, which is under consideration in the present case, was passed. On these grounds, it appears to me to be clear that this tenure is liable to sale in satisfaction of the decree of the 8th of April 1873.

If it is necessary in the present case to express any opinion on the point of limitation which may possibly be raised in execution of this decree, I would state my opinion that the effect of the decree in the present suit would be, as has been recently held by me, sitting with Mr. Justice MARKBY, to revive the execution from the point at which the adverse order to the decree-holder was passed, that is, on the 13th of May 1876. The proceedings in execution, therefore, would not be barred under section 58 of the Rent Law, inasmuch as the property being under attachment, and at that time being at the point of being sold, it would not be necessary to issue any fresh process of execution. To complete the proceedings, it would only be necessary to issue a fresh notification of sale, and, therefore execution could not be held to be barred. I, therefore, dismiss the special appeal with costs.

McDONELL, *J.*

McDONELL, *J.*:—

I concur in holding that this appeal must be dismissed with costs. It has not been shown to us that there was any error of law in the decision of the lower Appellate Court, and the points raised in special appeal have been fully answered by Mr. Justice PRINSEP.

[CIVIL APPELLATE JURISDICTION.]

NARAIN CHUNDER CHOWDHRY . . . . PLAINTIFF;

AND

TAYLOR AND OTHERS . . . . . DEFENDANTS.

1878
June 12th.

*Auction Sale—Arrears of Revenue—Sale—Purchaser—Auction-purchaser—Cause of Action—Limitation—*Res Judicata.

Where, at an auction sale for arrears of revenue, a person purchases a permanently-settled zemindary, his cause of action, for possession of lands which he alleges to have formed a part of his permanently-settled zemindary, and for which he still pays Government revenue, will be held to have arisen at the date of his purchase. Such a purchaser is not barred by adverse possession which has barred the former (defaulting) proprietor, nor by decrees in suits for possession brought by the former (defaulting) proprietor, in respect of the same lands, and against the same parties.

Deman Ramjiwan Singh vs. *The Collector of Shahabad*, 18 W. R., p. 64; *The Collector of Moorshedabad* vs. *Roy Dhunput Singh Bahadoor*, 23 W. R., 38, cited.

REGULAR APPEAL from a decree passed by the Deputy Magistrate and Collector of Rajmehal, dismissing the plaintiff's suit.

The suit was for possession of certain lands called Taruf Hosainpur *alias* Manick Chuck, which were alleged to form portion of a zemindary which was purchased by the plaintiff at an auction sale for arrears of revenue, on the 21st of May 1874. The plaint alleged that the zemindary was one which had been permanently settled in 1793, at a jumma of Rs. 1,477-2, which jumma plaintiff still continued to pay; that the Ganges then formed the south-western boundary of this zemindary, the lands in dispute forming a portion of the north-eastern bank of the river; that in 1848 the lands in dispute were measured as part of plaintiff's zemindary, though they were then under water in consequence of the river having gradually shifted its channel to the north-east; that in consequence of the continued shifting of the channel to the north-east, the lands in dispute re-formed on

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Judgment.

the south-western in the year 1863, and the following years; and that the defendants then took possession of them.

It appeared that the former proprietor of the zemindary, Sheoba Nath Misser, instituted a suit against the present defendants in the Court of the Deputy Collector of Bhaugulpore for possession of these lands as forming part of the zemindary, but on the 28th of February 1866 that claim was dismissed. The plaintiff in the present suit held that that decision was not binding on him, he being an auction-purchaser under Act XI of 1859, but the lower Court held that it was. The Court held also that the suit was barred under the 12 years rule of limitation. The fifth issue framed by the lower Court was: "The lands in dispute having been settled with defendant under section 6, Act IX of 1847, which settlement is declared to be a final proceeding, is not the plaintiff debarred from bringing this suit which is virtually a suit to set aside such settlement? The learned Judge says in his judgment: "With reference to the fifth issue this suit cannot be brought. Section 5, Act IX of 1847, states that when an estate diluviates, the revenue shall be remitted proportionately. It is not optional to the proprietor to continue to pay and to hold a lien on the diluviated land in case of its re-forming, as the plaintiff appears to think. The case of *Dewan Ramjiwan Singh* vs. *Collector of Shahabad*, 18 W. R., 64, lays this down most clearly, though the Act itself is so clear that a ruling is not necessary." The plaintiff appealed.

Baboo *Unnoda Prosad Banerjea*, and Baboo *Nullit Chunder Sen* for Appellants.

Baboo *Taruckanath Dutt*, for Respondent.

The judgment of the High Court (1) is as follows:—

This suit was brought for possession of Hosainpur *alias* Mi[illegible]nick Chuck in Pergunnah Kakjole, in Towjee No. 518, and fo[illegible] wasilat from the date of suit laid at Rs. 23,000, the market value of the property.

1. JACKSON and TOTTENHAM, J.J.

Upon the written statement of the defendants it appears that a permanent settlement and assessment of rent in respect of the land in dispute had been made under the orders of the Board of Revenue, and it was insisted that such settlement was final, and not open to question in a civil suit. The ground of limitation was also set up.

The Extra Assistant Commissioner, without going into the merits, threw out the plaintiff's suit, *first*, on the ground that the plaintiff was barred, inasmuch as twelve years had elapsed from the time of the accretion of the land, and the taking possession by the defendants; *secondly*, because three years limitation applied from the date of the survey Deputy Collector's award; and, *lastly*, because by Act IX of 1847, the Court was debarred from entertaining the suit.

As to the first two grounds, it is clear that the plaintiff would not be barred, because he is an auction-purchaser of the estate, and, as such, is entitled to recover it free of all encumbrances; and his cause of action, by whatever period of limitation restricted, would arise from the time of his purchase, and the period of limitation is to be computed from that time; and it seems that the present suit is brought within three years from the date of the plaintiff's purchase.

As regards the objection under Act IX of 1847, the Judge was quite misconceived, it seems to us, the case in 18 W. R., 64—*Dewan Ramjiwan Singh* vs. *Collector of Shahabad*, to which reference has been made, and there is an express authority in 23 W. R., 38—case of *The Collector of Moorshedabad* vs. *Roy Dhunpat Singh Bahadoor*, for holding that while, no doubt, the action taken by the Revenue authorities as to a settlement is final and cannot be questioned, that by no means debars a proprietor from bringing before a Civil Court his right to hold the property under any settlement that may be made. The judgment of the Court below, therefore, must be set aside as erroneous, and the case must go back in order to a trial on the merits.

[CIVIL APPELLATE JURISDICTION.]

1878 July 4th.

No. 117 of 1877.

PROSUNNO CHUNDER BHUTTACHARJEE. DEFENI

AND

KRISTO CHURN PAL. . . . . PLAINT

Estoppel—Legal Representative—Creditor—Debts of deceased—I to Suit.

If the sole legal representative of a deceased Hindoo knowing mits a stranger to continue in possession of the deceased prop his widow, and suffers a creditor of the deceased to sue the wom get a decree against her under the belief that she is the represe of the deceased, he will not, as against the decree-holder, be allo say, that the property of the deceased which had been in the str possession is not liable to be taken in execution of the decree.

Mir Ashruf Ali vs. *Roy Lutchmiput Singh*, 2 C. L. R cited.

SPECIAL APPEAL from a decree passed by the Subor Judge of Moorshedabad affirming that of the Moonsi Berhampore.

Baboo *Gooroo Das Banerjee*, for Appellant.
Baboo *Umakali Mookerjee*, for Respondent.

The judgment of the High Court (1) was delivered by

MARKBY, *J.* MARKBY, *J.* :—

In the year 1872, one Prankristo Chuckerbutty died, le no child or near relation. Prior to his death he had been with one Briputy Bhushun Dey, as his wife, and at his this woman managed the ceremonies of his funeral, no relative having then come forward, and she continued to li Prankristo's house and took possession of his property. a year before his death, Prankristo had obtained a loan the present plaintiff for a small amount. After Pranki death the plaintiff sued Briputy as representative of

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kristo, describing her as his widow, for the amount of the loan. She did not defend the suit, and the plaintiff obtained a decree for Rs. 71-3-9.

When, however, the plaintiff went to execute his decree against the property of Prankristo, he found that it had all been transferred to the possession of the present defendant, Prosunno Chunder Bhuttacharjee, the brother of Briputy, with whom she had gone to reside. Prosunno Chunder was a distant relative of Prankristo's, but he made no claim to the property on that account. He claimed under a will by which he alleged that Prankristo had made him devisee of his whole property for the maintenance of Briputy and the performance of certain religious ceremonies, and subject thereto for his own benefit. The value of the estate is not mentioned, but it is very small. There were some other debts due by the estate. Prosunno Chunder Bhuttacharjee, after the plaintiff had got his decree against Briputy, obtained probate of the will, and then applied that the property, which the plaintiff had attached in execution of his decree, might be released from attachment, which application was granted. The plaintiff then brought this suit to have it declared that the property of Prankristo in the hands of Prosunno Chunder was liable to satisfy he decree which he obtained against Briputy as representative of the deceased.

The Courts below have found upon evidence that the debt was really due by Prankristo; that the plaintiff brought his suit against Briputy in good faith, believing her to be the true representative of Prankristo; and that Prosunno Chunder, though he was aware of these proceedings and knew what mistake the plaintiff was making, purposely abstained from coming forward or saying anything about the will. It also appears that Briputy was not the wife of Prankristo, but the widow of a relation living under his protection. Both Courts have declared the property in the hands of the defendant, Prosunno Chunder, belonging to the estate of Preonath to be liable to be taken in execution of the plaintiff's decree. The defendant Prosunno Chunder has appealed.

There is no doubt that it will be a grievous hardship upon the plaintiff if he fails in this suit. If he cannot enforce the decree

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Judgment.

MARKBY, *J.*

which he obtained against Briputy, he will lose the debt whi is justly due to him, for the cause of action on the original bo has been barred long ago; and yet the plaintiff has been dil gently pursuing his remedy against the person who, he h every reason to believe, was the true representative of the d ceased.

The question is really this: Are the creditors of a decease person liable to have their claims defeated by the trick of kee ing secret the existence of a will until their claims are barre by limitation? If this had been the estate of a Europea British subject, there would have been no difficulty. Und section 206 of the Succession Act, the plaintiff, as a credito might have applied for letters of administration. Then, wheth the party in possession of the will had produced it or not, t administration would have gone on, and the creditors would n have lost their remedy. But section 206 of the Succession A does not apply to Hindoos.

The executor does not represent the deceased by virtue of t will until he has obtained probate. Who then represents t deceased who has left a will from his death until probate h been obtained? Surely some one must do so, or the law wou not have provided that the Statute of Limitation should run b tween the death and the grant of a probate as it undoubted does.

The decisions of the Courts in India have been liberal in cognizing the Acts of the *de facto* manager of the decease estate as valid. If Briputy had actually paid the debt of plaintiff, or if the plaintiff had actually seized and sold the p perty of the deceased whilst in her possession and had recei payment out of the proceeds, I do not think the executor co have received back either the money paid to the plaintiff or t property sold in execution. (See the cases set out in my ju ment in the case of *Roy Luchmiput Singh* vs. *Mir Ashruff A* 2. C. L. R., 223.)

Upon the whole, I think that until some other claimant co forward, the party who takes possession of the estate of a ceased Hindoo must, in the present state of the law, be tre for some purposes as his representative, and that a judgm

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Judgment.

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obtained against such a representative is not a mere nullity. Even if it cannot be executed against the estate in the hands of the executor when he has taken out probate, it is at any rate sufficient to enable the plaintiff to bring a suit against the executor in order to have that decree satisfied.

I give this opinion with some hesitation, as the subject is one which in its general bearings has not been much considered. But on the whole, I think, that this view of the matter, whilst it meets the justice of the case, is in accordance with decided cases.

I think, therefore, that the decree of the Moonsiff was right, and should be affirmed, and that this appeal should be dismissed with costs.

July 4th.

No. 781 of 1877.

UMA SUNDARI *vs.* NITTYANUND SHAHA RAI AND ANOTHER.—*If the heir of a deceased Hindu stands by and allows a stranger to enter into possession of the deceased's property, every person claiming under him will be bound by the decree in a suit of which he had notice, instituted* bona fide *against the party in possession for the recovery of a debt due by the deceased to the plaintiff.*

MARKBY, *J.*, (PRINSEP, *J.*, concurring) :—The plaintiffs in this suit are minors, and sue by their mother to obtain possession of 8 annas of a Shikmee Talook. The property belonged to Tiluck Biswas, the maternal uncle of the minors, who died on the 17th January 1868 apparently a good deal involved. He left no children, and when he died his brother's wife took possession of the property. Whilst she was in possession, a creditor of Tiluck sued her as representative of Tiluck and obtained a decree. Under this decree the property was sold and purchased by the defendant Nittyanund, on the 12th of September 1869. The plaintiffs claim the property as heirs of Tiluck. Both the Courts below have dismissed the suit; and the guardian of the minors has appealed to this Court on their behalf.

There is no doubt whatever that the proceedings in the suit brought by the defendant were perfectly *bonâ fide*, and that the debt was due; and there is also no doubt that the father of the minor plaintiffs, who was at that time alive, and who was the true heir of the deceased, was aware of the proceedings by which the property was brought to sale.

A case, which is in some respects similar to this, has been dismissed recently by a Full Bench—*Roy Luchmeeput Singh* vs. *Mir Ashruf Ally*, 2 C. L. R., 223; and, though I have thought fit respectfully to differ from the judgment of the majority, I am nevertheless bound by their opinion. But so far as the point now before us is concerned, I do not think that that decision goes

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Judgment.

MARKBY, J.

farther than this: That a sale which takes place in execution of a dec for a debt due by the ancestor obtained by consent against the repres tatives of a deceased Mahomedan, cannot bind absent parties even thou the debt is really due and the sale is to a *bonâ fide* purchaser who h purchased that which the Court has ordered to be sold.

But the parties here are Hindus, and this decree is not shown to hav been obtained by consent. Even, however, if it was obtained by consen I do not know of any authority for saying that under the Hindu la any absolute invalidity affects decrees obtained against an estate by consen though one may reasonably feel less confidence in a decree obtained b consent than in a decree obtained upon evidence, and this may be a nc unimportant consideration in some cases.

Here, as I have said, there was no doubt that the debt was really du from the estate, and that the assets of the estate were rightly applied i liquidating it. The minors have had the benefit of that payment, and i would be extremely hard if the defendant, with whose money the debt wa paid, was now to be compelled to surrender the property.

I do not think that the Full Bench decision applies to this case; and, that case be out of the way, there is then ample authority that the sale t the defendant is good as against the true representatives of Tiluck Biswa These cases are referred to in full in my judgment in the Full Bench ca above referred to, and I need not here do more than mention the referenc to them—3 Sel. Reports, 93; 6 Moore's Ind. App, 413; Marshall, 61 5 Wyman, 27; 10 B. L. R., 294; 22 W. R., 59; 24 W. R., 388.

This is in accordance with the view taken by the Court below, and th special appeal will, therefore, be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

PROSUNNO NATH ROY . . . . . PLAINTIFF;

AND

JOGUT CHUNDER PUNDIT . . . . . DEFENDANT.

1878 June 14th

No. 1203 of 1877.

Merger—Contribution—Putneedar—Zemindar.

The putneedar of a mehal which formed a portion of a zemindary, purchased the zemindary rights in the mehal. From the date of his purchase he paid no rent as putneedar. *Held*, that he could not set up his title as putneedar against his zemindary co-sharers, in a suit brought by them for contribution.

SPECIAL APPEAL from a decree passed by the Judge of Moorshedabad, reversing that of the Moonsiff of Berhampore.

This was a suit for contribution. Three mehals, Jorior, Prosadpur, and Durgapur, formed a zemindary belonging to a person named Roy. On the 28th of September 1865, Roy granted a putnee of Mehal Durgapur to the defendant Jogut Chunder. Shortly afterwards, in execution of a decree against Roy, Durgapur was sold and purchased by one Ram Das, who sold it to the plaintiff on the 28th of January 1873. Previously to the latter sale, namely, on the 17th of April 1872, the plaintiff had purchased from the Roys all their remaining interest in the zemindary; and, on the 30th of June 1876, the present suit was instituted for the purpose of obtaining contribution, plaintiffs having paid the Government revenue for the whole zemindary. Defendant, who had paid no putnee rent since his purchase from Ram Das, alleged that he was not zemindar, but putneedar; that neither he nor his vendor ever took up this purchase, and that he declines to do so; and that he would have been willing to pay the putnee rent had it been demanded from him. [No demand appears to have been made on the defendant personally.]

The Court of First Instance gave plaintiff a decree which was reversed on appeal. Plaintiff then specially appealed.

Baboo *Mohini Mohun Roy*, and Baboo *Taruck Nath Sen*, for appellant.

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PROSUNNO NATH ROY. v. JOGUT CHUNDER PUNDIT.

Judgment.

MARKBY, *J.*

Baboo *Kali Kissen Sen*, for Respondent.

The judgment of the High Court (1) was delivered by

MARKBY, *J.* :—

We think that the judgment of the District Judge in thi is wrong. It appears that there were certain villages fo one estate, and that the defendant took a putnee of one of villages in 1272, and paid his rent to the then zemindar Roys. Subsequently, in execution against the Roys, their z dary rights in this village were sold to one Ram Das, who it to the defendant, that is, the putneedar himself, on the Bysack 1279, and from that date no putnee rent was paid.

Upon these facts it appears to us that the only reaso inference is that, not only did the defendant purchase the z dary right, but that he became possessed of it, and the he is a co-sharer with the plaintiffs in this zemindary. quite true that the plaintiffs subsequently purchased the re ing interest of the Roys in this zemindary, but that coul possibly interfere with the previous purchase made by Ram Ram Das asserted his previous purchase by selling to th fendant, and it is not possible for the defendant now to sa not having paid any putnee rent since his purchase, that not the zemindar.

The decree of the Moonsiff is right and must be restored costs. The appellants will also get their costs in this and the lower Appellate Court.

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[CIVIL APPELLATE JURISDICTION.]

HURRO NATH BHUNJO . . . . . DECREE-HOLDER;

AND

CHUNNI LALL GHOSE . . . . . JUDGMENT-DEBTOR.

1878 *June 24th.*

No. 25 of 1878.

Limitation—Execution of Decree—Execution—Proceedings barred by Limitation—Kistbundi—Act IX of 1871, *Schedule II, Art.* 167.

A decree-holder having arrested his judgment-debtor in execution of the decree, the latter was released from arrest on agreeing to pay the amount of the decree in monthly instalments of ten rupees. The execution proceedings were then struck off the file in September 1873, and the judgment-debtor continued to pay until October 1876, when he ceased. The decree-holder then applied for execution of the decree against the property of the debtor. *Held*, that execution was barred by limitation, because more than three years had elapsed from the date of the last application to enforce or keep in force the decree.

PPEAL from an order passed by the District Judge of the -Pergunnahs, reversing that of the Subordinate Judge of that trict. The judgment appealed from is as follows :—

" In this case there have arisen some difficult points of law. e respondent got a decree against the appellant in 1864—more n thirteen years ago. In 1873, the latter was arrested under nd applied for his discharge under section 273 of the Proure Code. The Subordinate Judge passed the following r :—' He must pay ten rupees per month, or else be sent to . This arrangement is certainly subject to be modified on aterial change in the petitioner's circumstances.' The apnt having to choose between jail or agreeing to pay ten es per month, chose the latter alternative, and immediately led. The District Judge held that he had been released omising to pay ten rupees a month, and refused to inter-

ellant continued to pay till more than three years from of the last application had expired, and then ceased. ecution case was struck off in September 1873. The

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Statement.

question is, whether execution is barred. The Subordinate Judge is of opinion that it is not, and for the following reasons: —*First*, that the decree must be considered as pending in execution, though struck off in 1873; *secondly*, that no application is necessary so long as the decree is pending in execution; *thirdly*, that the appellant is estopped from saying it is barred—*Dinonath Sen* vs. *Gooroo Churn Pal*, 21 W. R., 310.

"There are two main doctrines connected with execution that must guide me in deciding this appeal. Looking at the long list of authorities referred to in the case of *Pisani* vs. *The Attorney-General of Gibraltar*, L. R., 5 P. C., 516, followed by *Sadasiva Pillai* vs. *Ramalinga Pillai*, L. R., 2 Ind. App., 219; 15 B. L. R., 403; 24 W. R., 193, there can be no doubt that if parties voluntarily agree to have a decree executed in a manner not strictly regular, they will be bound by it. So that if parties voluntarily change their decree, and replace it by a kistbundi, I imagine the kistbundi would be executed. I say, I imagine, because I am aware that there is a good deal of authority the other way.

"But this principle in no wise interferes with another equally strong, that parties cannot contract themselves out of the Statute of Limitations, and that no such contract would enable a decree once barred to be capable of being enforced. If authority for this proposition be necessary, I would refer to the judgment in *Heera Lall Mookerjee* vs. *Roy Dhunput Singh*, 24 W. R., 283; delivered by one of the Judges who took part in the judgment in 21 W. R., 310, referred to by the Subordinate Judge.

"The matter is then narrowed down to deciding, which of the applies to the facts of the present case.

"I am clearly of opinion that no novation took place in 187[illegible] as the Subordinate Judge pointedly remarks, there was noth[illegible] in the order to prevent execution against the property of [illegible] debtor. The Judge said, 'you must go to jail unless you pay [illegible] rupees monthly now, and whatever may be reasonable hereafter.' The debtor said, 'I will pay sooner than go to jail;' but [illegible] decree continued in force. Indeed the present application is [illegible] enforce it. So far, then, I do not think the appellant is estop[illegible] from pleading that the decree is barred. He has not done a[illegible]

thing that the decree-holder could possibly suffer from; on the contrary, the decree-holder has taken all that he could get. I do not blame him for so doing, but what I wish to put clearly is, that in my opinion the engagement simply was, so long as you are able to put me in jail unless I pay ten rupees, I shall do so; but there was no agreement that the decree should be executed after it was barred; and, if any such agreement had been made, the remedy, if any, lay in a suit for damages, and not in execution. I hold, therefore, that the appellant is not estopped, and the decision in 21 W. R., 310, does not apply.

"Then let us turn to the other reasons. (There was no novation; and, as the order of payment was not in the decree, the last clause of Art. 167, schedule II, Act IX of 1871, does not apply.)

"The Subordinate Judge says, no application is necessary so long as the decree is pending in execution. But I think that, unless such an application is necessary, the words "keep in force" are meaningless; and, as no such application has been put in, the decree is barred, even on the assumption that the execution proceedings continued to exist. Lastly, I am of opinion, that the previous execution proceedings closed on the 9th of September 1873, and did not continue to exist afterwards; and if this be so, the decree is clearly barred. I, therefore, decree the appeal with costs, and pleader's fees two gold mohurs, all to carry interest at per cent. from the date of decree."

The decree-holder appealed on the following grounds: (1) That the lower Appellate Court has erred in law in holding that the execution of the decree in this case is barred by limitation, inasmuch as the present application for execution is not a new application, but is in continuation of a previous one admittedly made within time; and (2) that the lower Appellate Court should have held that, by reason of the order of the Subordinate Judge, dated the [illegible] of August 1873, acted upon by the parties for a long time, the execution of the decree in this case is not barred by limita-

[illegible], for Appellant. Baboo *Doorga Ram Bose*, with him.

[illegible] *Srinath Dass*, Baboo *Gopal Lal Mitter*, and Baboo [illegible] *Gopal Palit*, for Respondent.

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Judgment.

MARKBY, *J.*

The following judgments were delivered by the High Court (1):—

MARKBY, *J.*:—

I think that there is no ground upon which we can say in special appeal that the judgment of the lower Appellate Court was wrong. The decree is dated the 18th of July 1864. By some means or other the decree was kept in force until the year 1873, when the defendant was arrested. He applied for his discharge under section 273 of Act VIII of 1859; and, upon that application, an arrangement was come to that he should not be sent to jail provided he would undertake to pay the sum of ten rupees a month towards the liquidation of the decree. That arrangement having been come to, execution proceedings were struck off in September 1873. The judgment-debtor paid ten rupees a month as agreed upon up to October 1876. Subsequently, on the 21st of June 1877, an application was made by the decree-holder to execute the decree of the 18th of July 1864, by arrest.

The District Judge of the 24-Pergunnahs has held that that application must be refused, on the ground that by the law of limitation applicable to this case, execution of the decree dated the 18th July 1864, is barred. The District Judge has entered into a question, whether the arrangement made in 1873 was a substitution of a new arrangement between the parties for the old decree. It appears to me that no question of that kind arises in this case, because the decree-holder is not now seeking to enforce by means of execution the new arrangement, but he is seeking to enforce his old decree. We must, therefore, see whether execution of the old decree, dated the 18th July 1864, is barred. Article 167, Schedule II, of the Limitation Act (IX of 1871) provides, so far as it applies to this case, that an application for execution shall be made within three years from the date of the decree, or of issuing notice under section 216 of Act VIII of 1859, or from the last application to enforce or to keep in force the decree. Now the last application to enforce the decree was made on the 25th January 1873, and this present application was made on the 21st June 1877. Prima

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therefore, this application is too late. But the decree-
contends that this is really not a new application for
on at all; that the proceedings, although struck off the
re really only in suspense; and that he has a right to
is present application as a continuation of the old pro-
upon the same principle as that on which the case
d in 23 W. R., 183—*Baboo Pyaroo Tuhobildarinee* vs.
Vazir Hossein, was decided. I quite admit that the mere
off the case from the file is not conclusive upon this
; and it is now settled by numerous cases that we
ook to all the circumstances of the case and consider
the execution proceedings were really brought to an
But it must be borne in mind that this question is in a
easure, if not entirely, a question of fact. When the
was before this Court in that case in 23 W. R., 183, we
aling with it as a Court of Regular Appeal, and there-
were entitled to go into the facts; and I think, as appears
e report in that case, that we dealt with the question
a question of fact.

is case the District Judge has found, as a fact, that the
execution proceedings closed on the 9th September
nd the only ground upon which we, as a Court of Special
can say that he was wrong in coming to that conclusion
aying that he has misunderstood the nature of this
ent. I am not prepared to go to that length. The
Judge says that he understands this arrangement to
n that the decree-holder would not execute his decree
the judgment-debtor by putting him into jail, so long
would pay him ten rupees a month; and he does not
d it to have been any part of that arrangement that
proceedings should be kept pending. Whether the
ld make an arrangement to keep the execution pro-
ending, I need not consider. I see no sufficient reason
from the opinion of the District Judge, who has con-
case very carefully. I think, therefore, that there
d of special appeal whereon we can say that the
e was wrong. The appeal must be dismissed with

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PRINSEP, J. :—

I am also of opinion that execution of this decree is barred by limitation, because more than three years have elapsed from the date of the last application to the Court to enforce or to keep in force the decree. So far as the facts appear from the judgment of the District Judge, it seems that the last application to execute this decree was in January 1873. The present application is now made in June 1877. It is true that in the interval the judgment-debtor was arrested on that application of 1873, and that an arrangement was come to by which he was to pay ten rupees per month which he ceased to do in October 1876; but so far as the execution of this decree went, it ceased on his release from arrest, and more than three years have elapsed since the last application was made. On the first objection taken in special appeal, I entirely agree with the judgment which has just been delivered.

[CIVIL APPELLATE JURISDICTION.]

July 5th.

No. 1551 of 1877.

KOROMALI AND ANOTHER . . . . . DEFENDANTS;

AND

AMIR ALI . . . . . PLAINTIFF.

Pre-emption—Mahomedan Law—Co-sharer—Payment of Rent separately—Preliminary ceremonies—Talub.

A and B, Mahomedan co-sharers of a talook, made separate agreements to pay rent to the zemindar, each shareholder being liable for his own share of the rent merely. Subject to this arrangement, the lands continued *ijmaler*: *Held*, that, on a sale by A of part of his share to a stranger, who was also a Mahomedan, B was entitled to pre-emption.

Where the first talub (*talab mowasibut*) is made in the presence of witnesses, and the witnesses are then called to bear testimony to the fact, it is not necessary to invoke witnesses on the occasion of the second talub (*talab ishhad*).

Syed Waziid Ali Khan vs. *Lala Hanuman Prosad*, 4 B. L. R., A. C. 139; and *Garibala Khan* vs. *Kebul Lal Mitter*, 13 W. R., 125, cited.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Chittagong.

Baboo *Aukhil Chunder Sen*, for Appellant.
Moonshee *Serajul Islam*, for Respondents.

The facts of the case are sufficiently set forth in the judgment of the High Court (1) which is as follows :—

This was a suit brought to recover possession of a share in two talooks on the ground of pre-emption. Both parties, the plaintiff and defendants, as well as the vendors, are Mahomedans. The Moonsiff found against the plaintiff upon the two material questions arising between the parties : *first*, that he is not a partner in the property sold; and, *secondly*, that he did not perform he preliminary ceremonies in accordance with the provisions of he Mahomedan law. There was also another question raised etween the parties which it is necessary in this special appeal o notice, namely, whether or not the purchaser had to pay Rs. 60 over and above the amount stated in the bill of sale in rder to purchase the rights of two sisters of the vendors, Mahomd Moonshee and Ashgur Ali. Upon this last question the inding of the Moonsiff was not in favour of the plaintiff.

On appeal by the plaintiff, the Subordinate Judge has held that he plaintiff is a partner in the talook sold, and he has further ome to the conclusion that the preliminary ceremonies had een duly performed. It appears that there was no objection aised by the plaintiff in his appeal with reference to the finding f the Moonsiff as to the amount of consideration paid by the endees, defendants. Upon these findings in favour of the plainff, the Subordinate Judge has decreed the plaintiff's claim in hese words: "The plaintiff is entitled to obtain possession of he disputed land by virtue of his right of pre-emption. The efendant No. 1 must give up possession to the plaintiff on ayment by the latter of the consideration-money stated in the obala."

The first point that has been raised in special appeal is, that he judgment of the lower Appellate Court, with reference to the uestion whether the plaintiff is a co-sharer of the talook sold r not, is erroneous.

The facts found with reference to this point are these: that the

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plaintiff held a share in the talook sold, but that before the sale his share of the talook was so far separated as to bear a definite rent in the zemindar's sheristah; and the rent for which the plaintiff's share was liable is completely distinct from the rent for which the share sold was liable. It is also found that the lands which constitute the disputed share and the lands of the plaintiff's original share are still *ijmalee*, and have not been divided by metes and bounds.

Upon this state of facts, the defendants contend that the plaintiff is no longer a co-partner, and is not under the Mahomedan law entitled to enforce the right of pre-emption. We think that this contention is not valid. The decision of the Subordinate Judge upon this point is clearly supported by the authority of the case cited by him—*Garibala Khan* vs. *Kebul Lal Mitter*, 13 W. R., 125; and we think also that the case which was cited by the Moonsiff—*Syed Wajid Ali Khan* vs. *Hunuman Pershad*, 4 B. L. R., A. C., 139, in support of his view of the matter, not only does not support him, but shows on the other hand that the view taken by the Subordinate Judge is correct.

It also appears on referring to treatises of authority on the Mahomedan law that the view taken by the Subordinate Judge is correct. In the Hedaya, page 563, Vol. III, it is stated that "the reason for establishing this right," namely, the right of pre-emption in a partner, "is the circumstance of his property being continually and inseparably adjoined to that of a stranger (namely, the purchaser) which is injurious to him, because of the difference of a stranger's disposition and so forth, and certainly a greater regard is due to the partner than to the stranger who may have made the purchase, since the vexation that would ensue to the partner from forcing him to abandon a place which, from long residence, may have acquired his affections, would doubtless be greater than that to which the stranger is subjected; for although he may thus be dispossessed, contrary to his inclination, of a property over which he has acquired a right by purchase, yet still the grievance is but inconsiderable, since he is not dispossessed without receiving a due consideration; and as all the reasons equally hold in behalf of a neighbour, he is there entitled to the privilege of *shuffa* as well as a partner."

The reason for granting this right to a partner as appears from s passage, is that, if a stranger be allowed to purchase a share land which is in the joint possession of the person claiming right of pre-emption and the vendor, the inconvenience to person claiming the right of pre-emption would be greater n the inconvenience which would be caused to the stranger by priving him of his purchase on return to him of the consider-on. Applying this principle to the facts of this case, it seems as that the plaintiff is entitled to the right of pre-emption, and mere fact of his paying separate rent for his share in the land s not make the inconvenience spoken of here any the less. We ik that both upon the authority of express texts in Maho-lan law and decided cases, the decision of the Subordinate ge upon the point is correct.

he second objection taken before us is, that, accepting the ing of the lower Appellate Court with regard to performance he preliminary ceremonies as correct, still the conclusion at ch the lower Appellate Court has arrived is erroneous in . The lower Appellate Court has found that, at the time n the *talub mowasibut* was performed, the purchaser and e of the vendors were present, and the plaintiff invoked wit-es at that time. But the special appellant contends that is not a sufficient compliance with the provisions of Maho-an law. We think that the Subordinate Judge has come correct conclusion upon this point. He says: "Among rs, the purchasers and some of the vendors were present at time. This was a sufficient compliance with the rules of omedan law in respect of pre-emption. I think the lower rt is wrong in holding that a second *talub* with invocation itnesses was necessary."

e have referred to the Mahomedan law books of authority this point, and we find that the Subordinate Judge's view of law is correct, and that when the *talub mowasibut* is made in presence of witnesses, and the witnesses are then called upon to testimony to the fact, it is not necessary to invoke witnesses the occasion of the second *talub*, and therefore the special peal must fail on this point also.

The next objection taken by the special appellants is, that the

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decree of the Subordinate Judge should have directed the payment by the plaintiff of the consideration proved to have been actually paid for the property, and not merely the amount stated in the kobala. The finding of the Moonsiff upon this point, as already observed, was in favour of the defendants, and there was no appeal by the plaintiff to the Subordinate Judge upon this point. The latter should, therefore, have directed in the decree that the plaintiff should pay to the defendants the amount proved to have been actually paid by them, namely, the amount mentioned in the kobala, *plus* the sum of Rs. 60 paid for the share of the two sisters of the vendors, Mahomed Moonshee and Ashgur Ali. The decree will, therefore, be amended to this extent. But, as we think that if this matter had been brought to the notice of the Subordinate Judge, he would undoubtedly have altered his decree, and that it was a mere oversight on his part, we think that the special appellants must pay the costs of this appeal to the respondents.

[CIVIL APPELLATE JURISDICTION.]

July 5th.

No. 283 of 1876.

RAMPROTAB MISSER . . . . . DEFENDANT;

AND

ABHILAK MISSER AND OTHERS . . . . PLAINTIFFS.

Onus—Certificate—Possession—Heir at Law—Act XXVII of 1860.

Effect of granting a certificate under Act XXVII of 1860, stated.

Where a defendant in possession of certain property resists a suit for possession thereof, brought by parties who have proved themselves to be the nearest heirs of the last full owner, the onus is on the defendant to prove his title.

Tariny Churn Chowdhry vs. *Saroda Soonduree Dossee*, 3 B. L. R., A.C., 145; and *Thakoor Deen Tewarry* vs. *Ali Hossein Khan*, 13 B. L. R., 427, cited and followed.

REGULAR APPEAL from a decree passed by the Subordinate Judge of Sarun, decreeing the plaintiff's suit.

This was a suit for possession. The property in dispute belonged to one Dolesur Misser, who died childless in 1261 (1854-55) leaving his widow, Mussamut Grija Koer, him surviving. Grija

Koer continued in possession of the property until her death on the 5th of Bhadro 1281 (20th of August 1874). Shortly afterwards, the plaintiffs applied to the District Judge of Sarun for a certificate under Act XXVII of 1860 to enable them to collect the debts due to the estate of the deceased Mussamut, claiming to be the nearest male heirs of her deceased husband Dolesur Misser. The defendant, Ramprotab Misser, objected to the grant of the certificate, alleging that Dolesur and his wife Grija had adopted him as their son and heir by a deed dated the 8th of December 1845. The objection was upheld, and a certificate granted to Ramprotab. Plaintiffs then brought the present suit on the 14th of February 1876.

The defendant relied on the adoption, and contended that, as on the plaintiff's own showing there were two persons jointly entitled with the plaintiffs who had not been made parties, the suit should be dismissed. The Judge found that the plaintiffs and the two persons who were joined in the suit were the heirs of Dolesur Misser; that the objection of non-joinder of parties alleged to have joint title with the plaintiffs, was no ground for throwing out the suit at the defendant's instance that the defendant had failed to prove the adoption; and he decreed the plaintiffs' suit. The defendant appealed.

Baboo *Chunder Madhub Ghose*, and Baboo *Judu Nath Sahoy*, for the Appellant.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Doorga Pershad*, for Respondent.

The judgment of the Court (1) was delivered by

AINSLIE, *J.*:—

The plaintiffs in the present suit sue as heirs-at-law of one Dolesur Misser to recover possession of 111 beegahs odd cottahs of *birt* lands from the defendant, who claims them as having been adopted by Dolesur Misser in 1253 F.S., corresponding to 1845 A.D. The defendant relies on the adoption.

(1) AINSLIE and BROUGHTON, *J.J.*

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The Court below has held that the defendant has altogether failed to make out his case. The first objection taken in appeal is, that the plaintiffs, having alleged that the deed of adoption was spurious, were bound to open the case by giving some evidence to establish that allegation. It is also contended that, as a matter of fact, the evidence adduced by the defendant is sufficient to establish the fact of adoption under the deed on which the defendant relies. It is further argued that the plaintiffs cannot recover, inasmuch as they failed to make out their relationship to the deceased Dolesur Misser; and that, under any circumstances, the absence of Poran and Sungut Misser, who are members of the family, makes it necessary for the plaintiffs to prove the specific shares which they are entitled to recover.

It will be convenient to take first the objection that the plaintiffs have not made out their relationship to Dolesur Misser. Both parties have put in genealogical tables. These tables do not altogether agree. The Subordinate Judge has accepted that of the plaintiffs; but it appears unnecessary to make any declaration as to which of the two is the more correct, because, even assuming the defendant's table to be correct, it would appear that in the event of Dolesur Misser having been found to have died childless some one or more of the plaintiffs would be the person or persons entitled to the estate.

Then with reference to the objection as to the omission of Poran and Sungut Misser from the plaint, it may also be observed that, although their names appear in the tables given by both parties, they are more distant heirs than Abhilak Misser, who is the first plaintiff, and who is entitled, if the suit can be maintained at all, to recover the property from the hands of the defendant.

As to the objection that the burden of proof ought to have been laid on the plaintiffs to establish that the deed is a forgery, we observe that reliance is principally placed upon the decision of the Judge of Sarun, dated the 20th of February 1875, in a proceeding under Act XXVII of 1860. The object of proceedings under that Act is simply to provide for the collection of debts due to the estate of any deceased person at the time

his death. It is not intended by the Act that any inquiry should be made into the right to the property of the deceased generally; and it may happen under particular circumstances that a certificate would be granted to a stranger, being a creditor of the deceased, due security being taken as provided by the Act in all cases where there is any doubt as to whether some party other than the persons holding the certificate may not eventually prove to be entitled to the moneys realized under the certificate. Therefore, it was not within the province of the Judge, when disposing of the application before him under Act XXVII of 1860, to determine who were the persons entitled to the estate of the deceased Dolesur Misser; and more particularly so, inasmuch as the application before him was not in respect of the estate of Dolesur Misser at all, but in respect of the estate of Mussamut Grija Koer. It is contended that the petition of objection, dated the 14th November 1874, shows that the question at issue then was as to the succession to the property left by Dolesur Misser; but the judgment of the Judge recites that it was an application for a certificate to collect the debts due to the estate of Mussamut Grija Koer, the wife of Dolesur Misser; and we must take this declaration as conclusive. The case of *Thakoordeen Tewary*, reported in 13 Bengal Law Reports, page 427, was also relied upon by the appellant, and the following passage was cited:—"It was contended by Mr. Bell that the High Court ought not to have thrown the onus of supporting the deeds upon the appellant, and perhaps the mode in which the High Court treats this question may not be strictly correct. In a suit for setting aside deeds, some evidence ought to be given by the plaintiff in order to impeach the deeds he seeks to set aside;" but if the following passage also read, and the statements of facts at the commencement of the judgment of their Lordships of the Privy Council considered, it will be seen that these words apply specially to cases in which the facts are analogous. The facts in that case were, that the plaintiff was in possession, and was merely seeking to set aside certain deeds which he supposed would or might affect his [illegible] The sequel of the passage quoted above is as follows: "The Court seems to have regarded this suit as if it were an

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action of ejectment brought by the appellants as the heirs of the deceased lady, in which, having proved that they were her heirs, the burden was thrown upon the appellants to show a better title." So that this case is really an authority to shew that, in a case like the present, which is an action of ejectment by the heirs-at-law, the burden of disproving the instrument relied upon by the other side is not in the first instance on the plaintiff.

There is another case in 3 Bengal Law Reports, page 145, the case of *Tariny Churn Chowdhry* vs. *Saroda Soonduree Dassee*, in which this question has been distinctly determined. At page 159 the Court says:—"Where the possession of the legal heir after the death of the widow is prevented, and the usual course of inheritance changed, on the ground of an adoption having been made, we think that it is clearly upon the party setting up that title against the entrance of the legal heir to prove the adoption, both as regards the power of the adopter to adopt and also as regards the fact of the adoption if it be questioned."

Therefore, it appears to us that this contention of the appellants fails, and that the burden is distinctly upon him to establish affirmatively to the satisfaction of the Court, that there was an adoption, and that the deed on which he relies is a genuine deed.

The defendant seeks to change the course of descent of this property, and to take it from the persons on whom it would naturally devolve, by means of an alleged adoption. It is, therefore, necessary for him to prove very clearly that there is such an adoption. The evidence adduced in support of his claim appears to us insufficient. It consists, in the main, of the evidence of the defendant himself, who was called by the plaintiff, and three witnesses. The defendant does not profess to give any information as to the circumstances of the adoption of his own recollection, but he states that he lived with the deceased, that the deceased performed certain ceremonies on his account, that in 1259, (the adoption having taken place in 1253,) he being about thirteen years of age, Dolesur Misser made over to him the deed of adoption and other papers and told him to carry on the business, and that after Dolesur's death he used to do all the business connected with the estate, which is described by him "the *debat* and *durbar* business."

Two witnesses, Sheo Dutt Ram Bajpai and Tokmun Bajpai, (the first of whom says that he is the brother-in-law of Dolesur, and the other that he is also a relation,) were called to prove the adoption. They, no doubt, state that the adoption took place in their presence, and if their evidence is to be accepted it would establish the case of the defendant. The third witness, Ishree Pershad, corroborates with them to some extent; but the evidence of these witnesses seems to be insufficient to establish the adoption for the following reasons:—In the first place, none of them give any account whatever of the negotiations which preceded the adoption. Two of them at least were probably, and one of them we may say was certainly, in a position to give an account of such negotiations; and the terms in which the deed of the 25th Aughran 1253 is drawn up, make it most important that there should be some account given of these previous negotiations. Had there been a simple adoption by Dolesur of Ramprotab, Grija Koer could clearly have had no interest whatever in the property. In order to reserve to her a life interest in the estate, it was necessary that this should be done by express agreement between the adoptive father and the natural father of the boy to be adopted. Not only is there no evidence of any negotiations, but there is no suggestion that there was any agreement between the parties on this very important point.

Then, again, we find that during the life time of Grija Koer, the defendant was completely silent in respect of the adoption. It is said that there were no occasions on which it was necessary for him to come forward and proclaim the adoption; although nothing was done which made it absolutely necessary to proclaim the adoption, a great deal was done, and done by himself, which, in the absence of any publication of the adoption, was likely to be highly prejudicial to his own interests; and it is improbable that he would go on for a long series of years furnishing evidence which could be used against himself without taking steps to protect his own interest, when he must have known that the possession of Grija Koer was in consistent with the fact of his being an adopted son, unless there was some private arrangement giving her a title other than that of a Hindoo widow, and when he had in his hands the deed by which

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that specific arrangement was given effect to, and which requir that on the death of Dolesur the lady's name should be regi tered in the Collectorate as the owner of the estate for life. appears that from the year 1264 F.S., he went on from year year paying Government revenue on behalf of Grija Koer, statin her title in all the challans as that of a Hindoo widow simply.

Then it is to be observed that the payment of Governme revenue through the hands of Ramprotab Misser may b accounted for without the adoption. As far back as 1839, it i found that this family consisted only of females and one mal who is described in the petition of the 6th February of that yea as being of unsound mind, the term used being "*Sadaylou* which has been translated idiot, but which the Subordinat Judge thinks more correctly means a simpleton. There is som evidence given by the plaintiffs, though not very trustworth perhaps, that this man was in 1253, at the time of the alleg adoption, of unsound mind and unable to judge for himself th nature of his acts; but though he may not have been proved t have been at that time altogether out of his mind, there seem to be reason to believe that he had been treated as incapable managing his own affairs, for we find that Ishree Misser, another petition to the Collector, filed in 1839, preceding the o above alluded to, puts himself forward as guardian. On exam nation of the evidence as to the age of Dolesur, it seems pr bable that he was not guardian on account of the minority Dolesur, but rather on account of that defect of understandi which is alluded to in the petition by his grandmother, Mu mut Surroop Koer. Ishree Misser having remained during his li time as the manager of this man, his grandson Rampro may very naturally have succeeded him in that position. T would account for his name appearing on the challans as person through whose hands the revenue was paid, although might not be the adopted son.

Under these circumstances, we think that there are grounds to warrant our interference with the conclusion which the Subordinate Judge has arrived. The appeal m therefore, be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

KRISHNA KISHORE SHAHA . . . . . DEFENDANT;

AND

BIRESHUR MOZUMDAR . . . . . PLAINTIFF.

1878 *July* 18*th*.

No. 2061 of 1877.

Special Appeal—Small Cause Courts—Damages—Regulation VIII of 1819—*Sale of Putnee Talook—Putnee Talook.*

Plaintiff is the holder of a putnee talook in the defendant's zemindary. The defendant, for the purpose of recovering rents which the plaintiff alleged he had paid, took proceedings under Regulation VIII of 1819, to bring the putnee to sale. Plaintiff, in order to save the talook, paid the amount—Rs. 68—into the Collectorate, and then brought a suit to recover back the money so paid, with interest. The suit was dismissed in the Court of First Instance, but this decree was reversed on appeal, and the defendant appealed specially to the High Court. *Held*, that the suit was one cognizable by a Court of Small Causes, and that no special appeal lay.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Rajshahye, reversing that of the Sudder Moonsiff of that District.

Baboo *Kishory Mohun Roy*, for Appellant.
Baboo *Saroda Churn Mitter*, for Respondent.

The judgment of the High Court (1) is as follows :—

We think that in this case the preliminary objection taken by the pleader for the respondent must prevail. The plaintiff sought this suit to recover from the defendant No. 1, Rs. [illegible]-12-1¼ under the following circumstances :—The plaintiff alleges that he is the holder of a putnee talook, the rent of which is Rs. 128-11-2½ ; that by an arrangement between himself and the defendants Nos. 1 and 2, the zemindars, he had, out of the rent payable by him, to pay Rs. 76-4, government revenue of the zemindaree, and Rs. 3-2, road cess, and that he accordingly, for the

(1) MITTER and MACLEAN, *J.J.*

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year 1281, paid these two amounts into the Collectorate; tl balance Rs. 49-5-1½, which was due to the defendants Nos. 1 was tendered to them, but they having refused to receiv money, he deposited the amount in the Moonsiff's Court on of April 1874, under the provisions of section 46, Act V 1869, B.C.; and that notwithstanding these facts the def No. 1 took proceedings under Regulation VIII of 1819 cover his half share of the rent payable by the plaintiff count of this putnee. The plaintiff further states that, al he protested against the proceedings on the ground that tl due had been already paid, the Collector passed an order i sale of the putnee tenure under Regulation VIII of 181 he, the plaintiff, in order to save the tenure, was acco obliged to pay, on the 1st of Joisto 1282, the sum of Rs. 6 claimed by the defendant No. 1. Under these circumstan plaintiff contends that he is entitled to recover back fr defendant No. 1 Rs. 68-6-1¼, together with Rs. 6-6, bei interest accruing due upon that amount.

We think that this is a suit which is cognizable by a C Small Causes. It is a suit for damages which the plaint tained by reason of the defendant No. 1 having taken proc under Regulation VIII of 1819, to recover money whi already been paid.

It has been contended on behalf of the special appella upon the facts stated in the plaint, the present suit w nature which was cognizable by the Collector under Act X o and is at present cognizable by the Civil Court under tl Law, Act VIII of 1869, B.C. This contention is base the 4th proviso of section 6, Act XI of 1865. That provi the following effect:—"For any claim for the rent of land claim for which a suit may now be brought before a E Officer, unless, as regards arrears of rent for which such s be brought, the Judge of the Court of Small Causes sh been expressly invested by the local Government with j tion over claims to such arrears."

This proviso refers to one of the excepted classes which the Courts of Small Causes are prohibited to ta nizance of. Is this a suit coming within this proviso

answer to this question evidently depends upon this, whether this suit could have been taken cognizance of by the Revenue Court, under Act X of 1859, and after the repeal of that Act, by the Civil Courts under Act VIII B.C. of 1869 which repealed Act X of 1859. Section 104 of Act VIII B.C. of 1869 also prohibits the Small Cause Courts from taking cognizance of cases which they could not take cognizance of previous to the passing of that Act. That section says: "Nothing in this Act contained shall be deemed to confer upon any Court sitting as a Court of Small Causes cognizance of any suit brought under the provisions of this Act, of which it would not have had cognizance if this Act had not been passed."

Therefore, the question we have to determine with reference to this argument is, whether under the provisions of Clause 2, section 23, Act X of 1859, this suit was cognizable by the Collector under the provisions of Act X of 1859. Clause 2 of section 23 says: "All suits for damages on account of the illegal exaction of rent or of any unauthorized cess or impost, or on account of the refusal of receipts for rent paid, or on account of the extortion of rent by confinement or other duress, shall be cognizable by the Collectors of land revenue, and shall be instituted and tried under the provisions of the Act, and except in the way of appeal as provided in this Act, shall not be cognizable in any other Court."

The question in this case is, whether, taking the facts which are stated in the plaint as correct, the defendant could be said to have illegally exacted any rent from the plaintiff within the meaning of this section. Now, it is quite clear that the defendant had recourse to a legal proceeding in order to compel the plaintiff to pay this money. He applied to the Collector to sell the putnee tenure under the provisions of Regulation VIII of 1819; and, therefore taking the plaintiff's case as correct, he might have, under clause 2, section 14, Regulation VIII of 1819, claimed a summary inquiry, and he might also, if there was no time for the summary inquiry to be concluded before the sale, have deposited the money and asked the Collector to hold the summary inquiry provided for in that section. It is, therefore, quite clear that, if the plaintiff was so minded, he might

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Judgment.

have applied to the Collector at any time before the sale was l and asked the Collector to inquire into his claim. Instea following that course the plaintiff paid the money to the ze dar, and under these circumstances we cannot say that was an illegal exaction of rent on the part of the zemin The zemindar had recourse to the provisions of the law w entitled him to bring the putnee to sale, and having taken t proceedings authorized by law, we cannot say that he illeg exacted any money. We are supported in this view of the by a decision reported at page 519, Hay's Reports, Vol. *Debendernauth Roy Chowdhry* vs. *Chundermonee Chowdhrain;* although the facts of that case are not precisely similar to facts of this case, the principle there laid down will equ apply to the decision of this case. In that case the Chief tice Sir BARNES PEACOCK, in delivering the judgment of Court, says: "The tenant might have contested his liab to pay that amount, and might have demanded a summar vestigation as to the amount due, and he might have stayed sale of the tenure by depositing the amount claimed. Instea doing so, however, he paid the amount claimed to the zemin The zemindar having recovered the amount under a proce prescribed by law, the question is, whether that is an u exaction. He possibly might have demanded more than due after allowing for the rice supplied; but the plaintiff, ins of demanding an investigation, paid the amount claimed knowledge of all the facts. Can this be said to be an illegal e tion of rent within section 23, clause 2, and section 10 of X of 1859? We think that it is not an illegal exaction of within the meaning of that Act." This case clearly sup the view we take of the nature of the claim in this case, we think that the suit is clearly cognizable by the Cour Small Causes; and therefore the special appeal to this C is barred by the provisions of section 27, Act XXIII of 1 The special appeal is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

SRIKANT ROY . . . . . DEFENDANT;

AND

SATCORI SHAHA . . . . . PLAINTIFF.

1878 *July 19th.*

No. 1723 of 1877.

Slander—Special Damage—Words actionable per se.

While C was giving his evidence in open Court, in a suit of A against B, A, with the object of inducing the judge to disbelieve C's testimony, said to the witness that he was a drunkard. *Held*, that the words were actionable without proof of special damage.

SPECIAL APPEAL from a decree passed by the Judge of Rungpore, reversing that of the Moonsiff of Bograh.

The plaintiff in this case was a witness for the defendant in a case brought by the present defendant, against one Bonomali. While being cross-examined by the then plaintiff's pleader, Srikant Roy asked him if he did not believe after the fashion of the *Kali-jug*, and when the plaintiff asked what Roy meant, the latter said :—"বাবড়ি পোর্ট চালা উপরা করা."

The plaintiff alleged that "the defendant made this remark with the intention that the Court should not rely upon my deposition as I am a drunkard. By this false and unjust allegation of the defendant, I suffer in character and am defamed. Therefore, I institute this suit for damages in Rs. 60, and for costs of Court with the interest thereof." No special damage was proved. The Court of First Instance dismissed the suit, but this decision was reversed on appeal. Defendant then specially appealed to the High Court.

Baboo *Issur Chunder Chuckerbutty*, for Appellant.
Baboo *Amaundronath Chatterjee*, for Respondent.

The judgment of the High Court (1) is as follows :—

The District Judge in this case has found that the defendant called the plaintiff, while he was giving his deposition in a case

(1) MITTER and MACLEAN, *J.J.*

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before the Moonsiff of Bograh, to which the defendant was a party, whether he (the plaintiff) did not believe after the fashion of the *Kali-jug*, and that when plaintiff asked for an explanation of the phrase, he said, 'you pour and re-pour brandy and port.' He also finds "that the defendant's object in using the expression complained of was to injure plaintiff in the eyes of the Court, and to detract from the value of his evidence." This being the finding of the lower Appellate Court, we think that the words used by the defendant are actionable. We, therefore dismiss the special appeal with costs.

NOTE.—In this case the lower Court found that the expression was made use of for the purpose of inducing the Judge to disbelieve the plaintiff's testimony, in other words it was equivalent to an imputation that the plaintiff was giving false evidence; and as giving false evidence in the course of a judicial proceeding is an offence punishable under the Penal Code, the decision comes within the English rule that words imputing an indictable offence are actionable *per se* without proof of special damage. So defamatory words imputing to the plaintiff that he is [when the words are made use of] afflicted with a contagious disorder are actionable *per se*; as also are defamatory words concerning tradesmen and professional men spoken of them in the way of their business or profession; words imputing misconduct or gross ignorance or incapacity to professional men in the discharge of their professional duties; and words imputing official misconduct to a person in an office of profit or trust. Apart from these five classes of cases, mere vituperation and abuse by word of mouth is not (in England) actionable *per se*, without proof of special damage.

In India the question does not seem to be so well settled, but the preponderance of authority seems to be rather against the English rule. In *Syed Ahmed Buksh* vs. *Purbuksh Mookhtarkar*, S. D. A., 1852, p. 1[illegible] the Court held that verbal abuse unattended by any actual damage was a matter purely of a criminal nature, and, therefore, that the Civil Courts were prohibited from entertaining such suits by section 18 of Regulation III of 1793. This decision was followed in *Ramdolall Bose* vs. *Kaleechurn* [illegible] S. D. A., 1852, p. 1135. In *Phoolbasee Kooar* vs. *Parjaun Singh*, 12 W. [illegible] 368, it was held (MACPHERSON and GLOVER, *J.J.*,) that a suit for damages for mere abuse would not lie, and the same opinion was expressed in *Gobindernath Dhur* vs. *Issuree Dossee*, 18 W. R., 531, (KEMP and GLOVER, J.J.) though the precise point was not then before the Court.

On the other hand, in *Moulvie Gholam Hossein* vs. *Hur Gobind* [illegible] 1 W. R., 19, it was held that an action would lie in the Civil Courts for mere abuse, without proof of special damage. The judgment is as follows:—

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Note.

"This was a suit for damages for defamation of character. The Judge holds that, under the decisions of this Court of 10th March 1852—*Syed Ahmed Buksh*, appellant, and of 22nd December 1852—*Ram Deo Lal*, appellant, a suit of this nature for mere verbal abuse does not lie unless actual injury and damage have been caused. These rulings were based upon the provisions of section 18, Regulation III of 1793, which, however, has been repealed. But even before this section was repealed, this Court, in their more recent decisions in 1857, held that not only might a complaint be brought in a Criminal Court, but a suit for damages might go on *pari passu* in the Civil Court. We reverse the order of the Judge; but as he has come to no distinct finding on the fact whether the abusive language was or was not used, we must remand the case to him. The Judge, after taking into consideration all the circumstances, will, if the case be proved, assess the damages at the rate he considers sufficient." [It may be noticed that the criticism on the case of *Ahmed Buksh* does not touch the ground of the decision there given, which is—that verbal abuse, from which no damage ensues, is without any element which a Civil Court can take hold of and entertain an action for, as the law does not necessarily imply damage therefrom; it is, therefore, purely a criminal matter, and consequently the Civil Courts are prevented from taking cognizance of it by the provisions of section 18, Regulation III, 1793. The introduction of Act VIII of 1859, and the repeal of the regulation by Act X of 1861, did not enlarge the jurisdiction of the Civil Courts in this respect; still they could not take cognizance of criminal matters. The reference to the cases of 1857 is also wide of the mark. These were cases of assault or assault and abuse, (not of abuse merely,) from which the law does imply damage, and in one of them—*Lukheenarain Chowdhree* vs. *Mohunlall Das*, the case of *Ahmed Buksh* was expressly distinguished on this ground.] In *Shaikh Tukee* vs. *Shaikh Khoshdel Biswas*, 6 W. R., 151, damages were given for mere verbal abuse on the ground that injury might result to one's feelings sufficient to sustain an action for damages. In *Ooseenooddeen* vs. *Futteh Mahomed*, 7 W. R., 259, it was also held, following the case in 1 W. R., 19, that an action would lie for damages for verbal abuse, but that the lower Court might give whatever damages it pleased. These cases were followed in *Gour Chunder Puttestundee* vs. *Clay*, 8 W. R., [illegible]; *Kalee Coomar Mitter* vs. *Ramguttee Bhuttacharjee*, 16 W. R., 84, [illegible]; *Sreenath Mookerjee* vs. *Komul Kormokar*, 16 W. R., 83; and by the Bombay High Court in *Kashiram* valad *Krishna* vs. *Bhadu Bapuji*, Bombay H. C. R., (A.J.), 17. One cannot tell whether these cases fall within the rules of the English Law, as the words complained of are not out.

[CIVIL APPELLATE JURISDICTION.]

1878 *July 20th.*

No. 128 of 1876.

KALI PROSONNO GHOSE AND ANOTHER . PLAINTIFF;

AND

KAMINI SOONDERY CHOWDRAIN . . . DEFENDANT.

Mortgage—Merger—Foreclosure—Re-opening Foreclosure Proceedings—Equity of Redemption—Account.

Where A, who has bought the equity of redemption of a mortgage, pays off the mortgage debt and causes the mortgage to be assigned to B in trust for A for the expressed purpose of avoiding merger, no merger will take place.

Watts vs. *Symes*, 1 De Gex, M. & G., 240; and *Adams* vs. *Angell* 5 Ch. D., 634, cited.

The owner of certain properties, X, Y and Z, mortgaged first X and Y, and afterwards X, Y and Z, to the same mortgagee. Both mortgages were purchased by A, who, having previously purchased the equity of redemption of X, then sought to foreclose Y in a suit on the first mortgage. Subsequently A brought a second suit against the mortgagor for the money due under the second mortgage. On appeal to the High Court, both suits were heard together, and it was *held*, that, supposing the first mortgage could be foreclosed separately—which was very doubtful—yet the effect of bringing a second suit would be, under such circumstances, to re-open the foreclosure proceedings, (or prevent their being sanctioned by the Court,) and to make A bring X into the account.

REGULAR APPEALS from decrees passed by the First Subordinate Judge of the 24-Pergunnahs, dismissing the plaintiffs' suits.

Paul, (Advocate-General) and *Evans*, for the Appellant. Babu *Hem Chunder Banerjee*, Baboo *Mohini Mohun Roy*, and Babu *Tarucknath Dutt*, with them.

J. D. Bell, for the Respondent. Baboo *Bhobani Churn* [illegible], Baboo *Rash Behary Ghose*, and Baboo *Opendro Chunder* [illegible] with him.

The facts of the case are sufficiently set forth in the judgment of the High Court (1) which was delivered by

GARTH, *C.J.*:—

These appeals have been argued together, and we think it right, under the circumstances, to dispose of them in one and the same judgment.

On the 26th March 1872, the defendant, Srimoti Kamini Soondery Dassee, borrowed Rs. 12,000 from Grish Chunder Banerjee, and to secure that sum and interest she mortgaged to him by way of conditional sale, a half share in five different properties—Kachiara, Atghara, Dariapur, Chupra and Alumpur. The loan was re-payable with interest at four per cent. per mensem within one month from the date of the mortgage.

On the 9th of May 1872, (the first mortgage being unpaid), the defendant, in consideration of a further loan of Rs. 24,000, gave Grish Chunder another mortgage by way of conditional sale of the same five properties as were mortgaged by the former deed, and also of three other properties, Hidgli, Turruf Ranaghat, and Dihi Santa. This sum of Rs. 24,000 was to be re-paid, with interest at Rs. 2-4 per mensem, on the 9th of May 1873; and the deed provided that the mortgagee was to have his remedy, either by foreclosure or sale of the mortgaged properties, or by suit against the mortgagor for the mortgage money and interest.

On the 29th of July 1873, no part of the above mortgage debts having been paid, Grish Chunder gave to the defendant the usual notice to foreclose the properties mortgaged by the first deed.

On the 23rd of March 1874, the defendant's half share in Alumpur was sold for arrears of revenue, and the plaintiff, Kali Prosonno Ghose, became the purchaser, subject to the mortgages then existing upon the property. As Alumpur was by far the most valuable of all the mortgaged properties, and as, by the pending foreclosure proceedings, the plaintiff's interest in it was in jeopardy, (his purchase of it having been made subject to the mortgages,) he arranged with

(1). GARTH, *C.J.*, and MCDONELL, *J.*

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Judgment.

GARTH, C.J.

Grish Chunder Banerjee to purchase from him his entire interest in the two mortgages, for the amount of principal and interest then due, and a bonus of Rs. 10,000 in addition. Accordingly, on the 3rd of June 1874, an assignment was made by Grish Chunder of the mortgaged properties to Bhogoban Chunder Mitter, (the plaintiff No. 2,) as trustee for the plaintiff No. 1, Kali Prosonno Ghose; the assignment being expressedly thus made to a trustee to prevent a merger of the mortgagor's interest in that of the mortgagee, as regards the estate of Alumpur.

Of the five properties which were mortgaged by the first deed, Chupra has been sold on account of a prior mortgage debt; and it is admitted that this property is not available under either mortgage.

On the 28th of April 1875, the plaintiff brought the first of these suits, (making his trustee Bhogoban Chunder Mitter a co-plaintiff,) for the purpose of obtaining possession of the three properties, Kachiara, Atghara, and Dariapur, (mortgaged by the first deed,) by force of the foreclosure proceedings; and also to obtain a declaration that he (the plaintiff) was entitled, by virtue of his purchase, as well as of the foreclosure proceedings, to a proprietory right in Alumpur. In this suit, the Subordinate Judge held that, as the plaintiff had purchased the mortgagor's interest in Alumpur, and the mortgagee's interest in the whole of the mortgaged properties, he had become both the payer and receiver of the mortgage debts, and that, consequently, those debts and the remedies for them had become extinguished; and he considered that, looking to the real substance of the transaction, the fact of the plaintiff having taken the assignment of the mortgage in the name of a trustee, (although he did so expressly to avoid the merger,) made no difference in his legal position. He accordingly dismissed the plaintiff's suit.

Meanwhile, on the 7th of February 1876, the other suit had been brought by the same plaintiffs against the same defendant to recover the amount of the mortgage debt and interest due under the second mortgage. This suit was heard by the same Subordinate Judge, and was dismissed upon two grounds: *first*, that by purchasing Alumpur the mortgage debt had become extinguished; and, *secondly*, that notwithstanding the terms of the

mortgage deed, the plaintiffs could have no personal remedy against the defendant for the debt until all his remedies against the property had been exhausted.

We consider that the view which the lower Court has taken of these cases is not altogether correct. In the first place, the Subordinate Judge was wrong in supposing that by taking an assignment of the mortgages *bonâ fide* in the name of a trustee, the plaintiff could not prevent the merger of the mortgagor's and mortgagee's interest, and consequently the extinguishment of the mortgage debt. The assignment was taken in the trustee's name, expressly for the purpose of preventing the merger, and keeping alive the two estates; and there is ample authority that this object may properly and legally be carried out by means of an assignment of this nature. (See *Watts* vs. *Symes*, 1 De Gex., M. and G., 240; and *Adams* vs. *Angell*, 5 Ch. D., 634.)

The real objection to these suits, in an equitable point of view, appears to us to be this: That the plaintiff, who is the beneficial owner of Alumpur, subject to the mortgages, and, as such, liable, conjointly with the owners of the other mortgaged properties, to pay his portion of the entire mortgage debts, has attempted to foreclose Alumpur and the other properties comprised in the first mortgage, for a part only of the mortgage debts, (that part which was due under the first mortgage,) and has then sued the defendant personally for the remainder, to the payment of which he himself, as the owner of Alumpur, is bound to contribute.

We have great doubt whether under such circumstances he had any right to foreclose at all under the first mortgage. Grish Chunder, the original mortgagee, had, by accepting the second conditional sale of the properties, consented to charge them with an additional mortgage debt, and having done so, it appears to us that it would have been inequitable on his part to foreclose the property under the first mortgage, and so deprive the defendant of that which both parties had agreed to look to as the primary means of satisfying the sum due upon the second mortgage. But even assuming, for the sake of argument, that the plaintiff could thus have foreclosed under the first mortgage, it is clear that he had no right (being himself the beneficial owner of Alumpur, and as such liable to contribute proportionately to the

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[illegible]

[illegible]

[illegible]

[illegible]

payment of both mortgages to foreclose the first mortgage in order to satisfy the debt due under that, and then to sue the defendant personally for the debt due upon the second mortgage, as though that debt were not a charge upon the mortgaged property at all and he himself were not liable for his proportion of it.

Even assuming that he could have foreclosed the first mortgage, which we much doubt, we are clearly of opinion that he had no right to bring the second suit; and that the bringing of that suit had the effect by analogy to the English rule of equity in such cases of re-opening the foreclosure, or preventing the foreclosure proceedings being confirmed or sanctioned by this Court, and of enabling us to make a decree which will at once secure to the plaintiff his just rights, and at the same time oblige him to do equity as regards the defendant. (See 2 Fisher on Mortgages, pp. 1154 to 1159, and cases there cited.)

We think, therefore, that under the circumstances the proper decree in both suits will be: That the first suit be dismissed, except as regards Alumpur; and that the plaintiff's right to Alumpur be decreed, the plaintiff No. 1 and the defendant being subjected to the following conditions:—

1st.—That as between the plaintiff No. 1 and the defendant, the properties mortgaged by both deeds (except Chupra) be valued by the lower Court.

2nd.—That the debt secured by the first mortgage be borne by the plaintiff No. 1 and the defendant, in the proportion of the aggregate values of the properties Kachhara, Atghara and Jaisapur to the value of Alumpur.

3rd.—That the debt secured by the second mortgage be borne by the plaintiff No. 1 and the defendant in the proportion of the aggregate values of all the properties mortgaged by the deed (except Chupra) to the value of Alumpur.

4th.—That the defendant be at liberty to redeem all the properties, except Alumpur, upon re-paying the proportion of the mortgage debts and interest due from her, corresponding with the proportionate value of the other mortgaged properties to Alumpur, until fresh proceedings for foreclosure or for sale

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mortgaged properties (except Alumpur) shall have been
in due course by the plaintiff.
—That until the mortgage debts and interests shall be
atisfied, the said mortgaged properties in the hands of
fendant shall be considered as charged with the propor-
the mortgage debts, which she is hereby declared liable

—That each of the parties do bear and pay his and her
sts of the first of these suits, and that the costs of the
suit in both Courts be paid by the plaintiff No. 1.

[CIVIL APPELLATE JURISDICTION.]

July 22nd.

No. 59 of 1878.

HARY SINGH . . . . . JUDGMENT-DEBTOR;

AND

VAR DOWLUT RAM AND ANOTHER . DECREE-HOLDERS.

on—Execution of Decree—Attachment and Sale—Act VIII (B.C.) of 1869, section 58.

. decree in a suit instituted under Act VIII (B.C.) of 1869, was
sed on the 13th of March 1873. Application for execution was made
the 18th of February 1876, but no process of attachment or sale
issued until the 2nd of April 1876. *Held*, that the attachment was
d, and not void as barred by limitation, under section 58, Act VIII
C.) of 1869.

Veera Lall Seal vs. *Poran Matteah*, 6 W. R., (Act X), 84; *Rhedoy*
ishna Ghose vs. *Koylash Chunder Bose*, 13 W. R., 3 F. B.; and *Lalla*
Sahoy vs. *Dodraj Mahto*, 20 W. R., 395, cited.

IAL APPEAL from an order passed by the Officiating
nal Subordinate Judge of Gya, reversing that of the
of Aurungabad.

Kashee Kant Sen, for Appellant.
espondent did not appear.

gment of the High Court (1) was delivered by

AINSLIE, *J.*

J.:—
appeal from an order of the Subordinate Judge of

(1) AINSLIE and BROUGHTON, *J.J.*

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DEODHARY SINGH v. KUNWAR DOWLUT RAM.

Judgment.

AINSLIE, J.

Gya, reversing the decision of the Moonsiff of Aurungabad. The latter officer held that the application of the decree-holders to execute their decree for rent was barred under section 58, Act VIII (B.C.) of 1869, inasmuch as the decree was for a sum less than Rs. 500, and the process of attachment and sale were issued after three years from the date of the final decree, which was made on the 13th of March 1873. There had been two previous applications for execution which were abandoned by the decree-holders. The last application was filed on the 18th February 1876. The records were called for from the Judge's Court and received on the 14th of March following, that is, one day after the three years had expired. On the 27th of March the officers of the Court drew up a statement of the amount due to the decree-holders, and on the 2nd of April a process of attachment was issued, which was followed by a proclamation of sale. The Moonsiff, however, considered that under the section referred to by him, these proceedings were of no effect. The Subordinate Judge, on the authority of the judgment reported in 13 W. R. p. 3, Full Bench Rulings—*Rhedoy Krishna Ghose* vs. *Koylash Chunder Bose*, has reversed the Moonsiff's order, and from his judgment there is now an appeal by the judgment-debtor.

The first case on the subject is one which is reported in 6 W.R., Act X, Rulings, p 84—*Heera Lall Seal* vs. *Poran Matteah*, decided by the late Chief Justice Sir BARNES PEACOCK and Mr. Justice MARKBY. In that case of course the decree was under Act X of 1859, but the words of section 92 of that Act are re-enacted in section 58 of the present Act. It was observed there that giving a reasonable construction to section 92 of Act X of 1859, the meaning is that no execution shall issue upon a decree unless a proper application for execution be made within three years from the date of the decree. The judgment then goes on to show that if a strict literal interpretation is to be given to the section a party, though acting with the greatest diligence, might very easily be deprived of the benefit of his decree.

The next case is the Full Bench judgment cited by the Judge below. The majority of the Court there took the same view that was taken in the case just referred to. The Chief Justice says that "the word 'issue' should not have a strict liter

interpretation put upon it. I should rather interpret it to mean sued out or applied for with success; that is, no application for a process of execution shall be successful unless the application for it is made or it is sued out within a fixed time." This was the opinion of the majority of the Court.

A case very much relied upon by the appellant before us is one which is reported in 20 W. R., p 395—*Lalla Ram Sahoy* vs. *Dodraj Mahto*, decided by Mr. Justice PHEAR and Mr. Justice MORRIS; but the result of that case seems to be this, that if a decree-holder, whose application has not been completely disposed of within three years from the date of the decree, makes any default and does not proceed upon it with due diligence, he will have to suffer for that default, and ought not to be allowed to go on with that application. I think it unnecessary to consider the interpretation of the Full Bench judgment then arrived at, because in the present case it is evident that there was no default on the part of the decree-holder at the time when the Moonsiff refused to allow him to go on with the execution of his decree. This case seems to be exactly analogous to that in 6 W. R., Act X Rulings, p 84. Therefore, the present appeal will be dismissed, but without costs, no one appearing for the respondent.

[CIVIL APPELLATE JURISDICTION.]

ROOP NARAIN SINGH AND OTHERS . . PETITIONERS;

AND

RAMAYEE SINGH AND OTHERS . . . . DECREE-HOLDERS.

1878
July 22nd.
No. 57 of 1878.

Execution of Decree—Defendant dying before decree—Representatives—Decree against a dead Man—Act VIII of 1859, *section* 119.

Where the sole defendant to a suit dies before decree, a decree passed against him on the supposition of his being still alive, is incapable of being executed.

Cases falling under Act VIII of 1859, section 119, stated.

REGULAR APPEAL from an order passed by the Judge of Tirhoot.

In this case the appellants preferred a petition to the Judge of Tirhoot, stating that after the death of their ancestor, Sheo Narain, a decree had been passed against him, at the instance of the respondents, in a suit which was pending at the death of Sheo Narain, and that the respondents had attempted to issue execution of that decree against the petitioners as the heirs and representatives of Sheo Narain. The Judge ruled as follows:—

"I am of opinion that I have no jurisdiction to entertain this application, admittedly made under section 11, Act XXIII of 1861. The applicants should have sought their remedy under section 119 of Act VIII of 1859, within one month after the process for enforcing judgment against them; but this they failed to do, and I cannot help him under his present application which is disallowed and rejected.

The petitioner appealed.

Mr. *H. E. Mendies*, for Appellants.

Baboo *Aubinash Chunder Banerjee*, for Respondents.

The judgment of the High Court (1) was delivered by

AINSLIE, *J.*

AINSLIE, *J.*:—

It appears to us that the Judge is wrong in supposing that on the facts alleged by the heirs of Sheo Narain they could have

(1) AINSLIE and BROUGHTON, *J.J.*

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ROOP NARAIN SINGH v. RAMAYEE SINGH.

Judgment.

AINSLIE, *J.*

made an application under section 119 of Act VIII of 1859. The case has been disposed of without any inquiry into the facts, and therefore it must be taken for the purposes of the present appeal that the allegations of the heirs of Sheo Narain are true They stated that Sheo Narain had died before the decree was made; that nobody had been substituted in his place; that, consequently, when the decree purporting to be a decree against Sheo Narain was made, there was no one in being against whom it was made; and that, as a consequence, the decree was void.

If the case fell under section 119, it would be because some person actually in being, who was intended to be affected by the decree in the suit, had not had that opportunity of defending himself, which at the time of making the decree he was supposed to have had. The case must go back to the Judge for an inquiry into the actual facts. If it turns out as a matter of fact that, previous to the date of the decree, Sheo Narain had died and no steps had been taken to substitute any one to represent him, the decree-holder cannot be allowed to proceed with the execution of the decree. Costs will abide the result.

[CIVIL APPELLATE JURISDICTION.]

1878
July 25th.

No. 289 of 1878.

FURZUND ALI KHAN AND ANOTHER . . . DEFENDANTS;

AND

AKA ALI MAHOMED . . . . . PLAINTIFF.

Compensation—Ejectment—Building on land belonging to another—Bona fides.

Where a man builds on land belonging to another, he will not, when ejected, be allowed any compensation for the buildings, unless the circumstances show that he built in good faith, believing the land to be his own.

Bani Madhub Dass vs. *Ramjoy Rokh*, 1 B. L. R., A. C., 213; *Rani Rama* vs. *Jan Mahomed*, 3 B. L. R., A. C., 18; *Bromo Moye Debee* vs. *Koomoodinee Kant Banerjee*, 17 W. R., 467; and *Bani Madhub Banerjee* vs. *Jai Krishna Mookerjee*, 7 B. L. R., 152; 12 W. R. 495.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Mozufferpore, affirming that of the Moonsiff of that station.

This was a suit for possession of a narrow strip of land, four cubits in breadth and forty-nine cubits in length, lying between the respective dwellings of plaintiff and defendant. The plaintiff stated that he bought the premises in 1849; that the house then in existence was built partly on the piece of land in dispute; that he knocked down that house preparatory to building the one he lives in at present; and that in building the latter he left this strip of open land between his house and the defendant's in order that there should be less danger in case of fire. He complained that the defendant had in his absence built on the land; and he asked that the building should be demolished, and possession of the land be decreed to him. The defendant claimed the land as his own.

The Moonsiff gave a decree as prayed for by the plaintiff, and this decision was upheld on appeal. The defendant then specially appealed to the High Court.

Baboo *Pran Nath Pundit*, for Appellant.

Moonshee *Mahomed Yusuf*, for Respondent.

The judgment of the Court (1) was delivered by

BROUGHTON, *J.* :—

The plaintiff in this case sues to recover possession of a piece of land which lies to the west side of his house. It extends from one end of his west wall to the other, and is four cubits wide and forty-nine cubits long. The defendants are the owners of the adjoining land west of the plaintiff's property and west of the disputed land which lies between the two walls of the plaintiff and defendant's, and which has been called a lane.

The case was originally tried in the year 1872, and was appealed first to the lower Appellate Court and then to this Court. The learned Judge who tried the second or special appeal, the late Mr. Justice LAWFORD, remanded the case for a fresh trial, on the ground that the Judges of the lower Courts had not tried the question of title but had given half the land to the plaintiff and half the land to the defendants, the division being made by a line down the middle, as the most convenient way of settling the dispute between the parties.

The Court of First Instance was, therefore, directed to try the title which it has now done, finding, after examining several witnesses, for the plaintiff; and ordering that a certain building, which the defendants had erected upon the land in dispute, should be demolished; and the lower Appellate Court has upheld this finding.

It is objected now on special appeal, although the finding of the lower Courts on the matter of fact cannot be disputed, that they have made an error in law in that they have not awarded compensation to the defendants for the building which they erected upon the plaintiff's land, and which has been ordered to be pulled down: and it has further been argued that the Courts had no power to order the building to be demolished at all, and several decisions of this Court had been cited in support of this

(1) BROUGHTON, *J.*

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contention by the pleader for the appellants. They were th cases—*Bani Madhub Dass* vs. *Ramjoy Rokh*, 1 B. L. R., A. C., 213 *Rani Rama* vs. *Jan Mahomed*, 3 B. L. R., A. C., 18; *Bromo Moy Debea* vs. *Koomoodinee Kant Banerjee*, 17 W. R., 466; *Lal Gopee Chand* vs. *Sheik Liakut Hossein*, 25 W. R., 211; and *Ban Madhub Banerjee* vs. *Jai Krishna Mookerjee*, 7 B. L. R., 152; als reported in 12 W. R., 495. All these cases proceed, however upon the principle that where the owner of land stands by and allows another person who believes that he himself has a *bona fide* title to erect buildings and make improvements on the land the owner cannot eject him and appropriate his buildings or his improvements. This principle has been recognized by the Legislature of this country, and it is enacted in Act XI of 1855, section 2, that "if any person shall erect any building or make an improvement upon any lands held by him *bona fide*, in the belief that he had an estate in fee-simple or other absolute estate, and such person, his heirs or assigns, or his or their under-tenants be evicted from such lands by any person having a better title, the person who erected the building, or made the improvement, his heirs or assigns, shall be entitled either to have the value of the building or improvement so erected or made during such holding, and in such belief estimated and paid or secured to him or them, &c.

This Act relates only to cases where the English law applies; but it embodies a principle which has been adopted in this country in the cases which have been cited, in which the English law is not applicable. The foundation of the right to compensation is the erection of the building or the making of the improvement by the trespasser in the *bona fide* belief that he has a title. If he had not such a *bona fide* belief, he is a mere trespasser; he has spent his money at his own risk, and can claim no compensation.

Now, in this case, the Courts below have found as a fact, and I have no jurisdiction in this special appeal to interfere with their finding, that the defendants erected the building, which they have ordered to be demolished, in the plaintiff's absence; and that they have placed the beams to support it actually in the wall of the plaintiff's house, which even now they do not lay claim

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This shows an entire absence of any *bona fide* belief on the part of the defendants that they were building on land to which they had a title, and consequently they can claim no compensation, but must pull down the building as directed by the lower Court.

The appeal must, therefore, be dismissed; the decree of the lower Courts will stand; and the defendants, appellants, must pay also the costs of this appeal, and interest at the rate of six per cent. per annum.

[PRIVY COUNCIL.]

June 5th.

THE QUEEN . . . . . APPELLANT;

AND

BURA HANGSEH AND BOOK SINGH . . . RESPONDENTS.

Legislative Councils, Powers of—Plenary powers of Legislation—Delegation—Jurisdiction—24 and 25 Vict., Cap. 67—24 and 25 Vict., Cap. 104, secs. 9, 11—28 Vict., Cap. 15—Letters Patent of 1865—Act XXII of 1869.

The Statutes 24 and 25 Vict., c. 104., 28 Vict., c. 15, and the Letters Patent of 1865, expressly contemplate and authorize such an exercise of legislative authority by the Governor-General of India in Council, as might remove any place or territory from the jurisdiction of the High Court at Calcutta. Act XXII of 1869 was, therefore, in its general scope, within the legislative power of the Governor-General in Council.

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.

When a question arises whether the prescribed limits have been exceeded, the established Courts of Justice must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they were restricted. If what has been done is legislation within the general scope of the words which give the power, and if it violates no express condition or restriction by which that power is limited, (in which category would be included any act of Parliament at

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variance with it,) it is not for any Court of Justice to inquire furt or to enlarge constructively those conditions and restrictions.

When plenary powers of legislation exist as to particular subje whether in an imperial or in a provincial legislature, they may be exercised either absolutely or conditionally; and the Indian Legi ture has power to legislate conditionally on the use of partic powers, or on the exercise of a limited discretion by a person in wl it places confidence.

The Governor-General in Council could not, by any form of en ment, create in India, and arm with legislative authority, a new le lative power, not created or authorized by the Council's Act; nothing of that kind has been done or attempted in Act XXI 1869.

APPEAL from a decision passed by a Full Bench of the H Court of Judicature at Calcutta, which will be found repo in the first volume of the Calcutta Law Reports, page 161, in the Indian Law Reports, Calcutta series, vol. 3, p 63.

Sir *James Stephen*, Q.C., and *Graham*, for the Appellant.

J. B. Norton, *Raikes*, and *Eardley Norton*, for the Resp dent.

The facts of the case and the arguments will be fo set out in the reports abovementioned, and in the follo judgment of their Lordships of the Privy Council (1), which delivered by

LORD SELBORNE.

LORD SELBORNE :—

This appeal has been brought under the following circ stances :—In the year 1869, the Indian Legislature passed an (No. XXII of 1869), purporting, *first*, to remove a district ca the Garo Hills from the jurisdiction of the Courts of Civil Criminal Judicature, and from the control of the offices of venue constituted by the Regulations of the Bengal Code and Acts passed by any Legislature then or theretofore establishe British India, and from the law prescribed for such courts and o by such Regulations and Acts; and, *secondly*, to vest the ad istration of civil and criminal justice, within the same terr

(1) Lord SELBORNE, Sir JAMES W. COLVILE, Sir BARNES PEACOCK MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

in such officers as the Lieutenant-Governor of Bengal might, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint. This Act was to come into operation on such day as the Lieutenant-Governor of Bengal should, by notification in the *Calcutta Gazette*, direct. By the 9th section, the Lieutenant-Governor was empowered "from time to time, by notification in the *Calcutta Gazette*," to "extend, *mutatis mutandis*, all or any of the provisions contained in the other sections to the Jaintia Hills, the Naga Hills, and such portion of the Khasi Hills as might, for the time being, form part of British India," being, as their Lordships understand, a mountainous district, conterminous towards the east with the Garo Hills.

The Lieutenant-Governor of Bengal, by notification in the manner prescribed by this Act, fixed the time at which it should come into operation in the Garo Hills; and afterwards, by another notification published in the *Calcutta Gazette*, on the 14th October 1871, he extended all its provisions to the district of the Khasi and Jaintia Hills, declaring the administration of civil and criminal justice within that district to be vested in the Commissioner of Assam, subject to the general direction and control of the Lieutenant-Governor, and adding that the Commissioner should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the district; provided, that no sentence of death should be carried out without the sanction of the Lieutenant-Governor, and that it should be competent for the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him might seem fit; and that the Deputy Commissioner of the district, and his assistants, the native chiefs and officers, and the subordinate officers of Government, should exercise the same powers as they had hitherto exercised, until otherwise directed.

Upon this Act and these notifications, one Burah (the respondent here) and another person, since deceased, were in the year 1876 tried by the Deputy Commissioner of the Khasi and Jaintia Hills upon a charge of murder committed within that territory. They were convicted and sentenced to death, but on the 23rd April 1876, the sentence was commuted by the Commissioner of Assam to transportation for life. On the

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9th July 1876, they presented a petition of appeal to the High Court at Calcutta; and a majority of the Judges of that Court (four against three) decided, after argument in Full Bench, that the case fell within their appellate jurisdiction; and they sent for the record of the proceedings, with a view to an adjudication thereon. From that decision the present appeal has, by special leave, been brought.

The ground on which the majority of the High Court assumed jurisdiction was, that the 9th section of the Act of 1869, purporting to authorize the Lieutenant-Governor of Bengal to extend the Act of 1869 to the Khasi and Jaintia Hills, was in excess of the legislative powers of the Governor-General in Council.

In the argument before their Lordships, the jurisdiction of the High Court was sought to be supported, not on that ground only, but on two others also, viz. (1), that the Act of 1869 did not, according to its true construction, exclude the jurisdiction of the High Court as to the Garo Hills, and, therefore, could not do so as to the Khasi and Jaintia Hills, assuming them to have been brought within its operation; and (2) that the whole Act of 1869 (at least so far as it might affect the jurisdiction of the High Court), and not section 9 only, was void and *ultra vires* of the Indian Legislature. The latter of these arguments had been urged unsuccessfully before the High Court at Calcutta; but the former was not presented to that Court, and was first suggested at the hearing before their Lordships, by the junior counsel for the respondent.

Their Lordships will first deal with that argument.

It was founded on the proposition that the 4th section of Act XXII of 1869 purports to remove the Garo Hills, not from the jurisdiction of the High Court, established by Her Majesty's Letters Patent under the authority of Imperial Statutes, but only from that of the local courts, constituted by the Regulations of the Bengal Code, or by Acts of the Indian Legislature; and therefore, that even if the jurisdiction of those local courts was effectually taken away, and others (constituted by the appointment of the Lieutenant-Governor of Bengal), substituted for them, the appellate jurisdiction of the High Court remained.

Assuming (but not deciding) that "the Courts of Civil and Criminal Judicature" mentioned in the 4th section of the Act of 1869, were only the Courts of Original Jurisdiction established under the Indian Regulations and Acts, their Lordships think that the supposed consequence does not follow. It may be possible that under the terms of the 8th and 9th sections of the High Court's Act (24 and 25 Vict., cap. 104), together with the 27th and 28th sections of the Royal Letters Patent (28th December 1865), under which the Calcutta High Court is constituted, appeals might have gone to that Court from Criminal Tribunals of first instance, established by the Lieutenant-Governor of Bengal in the Garo or the Khasi and Jaintia Hills, if Act XXII of 1869 had made no other provision for such appeals. But the 5th section of that Act distinctly authorises the Lieutenant-Governor to appoint Tribunals, not of first instance only, but also of "Reference and Appeal;" and, by the notification now in question, he has done so, giving the powers of the High Court to the Commissioner of Assam, with an ultimate controlling authority in himself. Unless, therefore, the whole Act of 1869, or the 9th section of that Act, was void, as being in excess of the legislative powers of the Governor-General in Council, the jurisdiction of the High Court has been excluded.

The next question is, whether the whole Act of 1869 is void. It is said to be so, because the jurisdiction of the High Court is established by the Act of the Imperial Parliament already referred to (24 and 25 Vict., cap. 104), which passed in the same session with the Indian Council's Act; and because by section 22 of the Indian Council's Act (24 and 25 Vict., cap. 67), the power of the Governor-General in Council "to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, in the said territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or subjects, foreigners or others, and for all Courts of Justice whatsoever, and for all places or things whatever within the said territories," is qualified by certain conditions; one of which is, "that the Governor-General shall not have the power of making any law or regulations which shall repeal, or in any way affect any

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of the provisions of any Act passed in this present Session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof." None of the other conditions, expressed in the Act, apply to this case.

The question therefore is, whether an exercise of the legislative power of the Governor-General in Council, purporting to exclude the jurisdiction of the High Court within these particular districts, is inconsistent with any of the provisions of 24 and 25 Vict., cap. 104.

Now, it appears to their Lordships from the express terms of the Act 24 and 25 Vict., cap. 104, that (unless there should be anything to the contrary in the Letters Patent under which the High Court is established) the exercise of jurisdiction in any part of Her Majesty's Indian territories, by the High Courts, was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council, as to "all Courts of Justice whatever."

By the 1st section of that Act, Her Majesty was authorized, by Letters Patent, "to erect and establish a High Court of Judicature for the Bengal division of the Presidency of Fort William, and others at Madras and Bombay. The next six sections relate to the qualifications, tenure of office, and emoluments, &c., of the Judges of such Courts. The 8th section abolishes, from the date of their establishment, the previously existing Supreme and Sudder Courts in the several Presidencies. The material provisions as to jurisdiction are contained in the 9th, 11th, and 12th sections. The 10th and 18th may be laid out of the case, because they were both repealed by a subsequent Act in 1865 (28 and 29 Vict., cap. 15.) But, as some argument was founded on the 18th, it may be fit here to observe, that by that section, Her Majesty was empowered to make orders in Council transferring any territory or place from the jurisdiction of one, to the jurisdiction of any other of the High Courts, "and generally to alter and determine the territorial limits of the said several Courts:" and that the same power was, in substance, conferred upon the Governor-General of India in Council (not in his legislative, but in his executive, capacity) by the repealing Act of 1865.

The 9th section of 24 and 25 Vict., cap. 104, expressly says, that each of the High Courts shall, within its own Presidency, have such civil, criminal, and other jurisdiction "as Her Majesty may, by her Letters Patent, grant and direct;" and that, "save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council," the High Court in each Presidency shall have all the jurisdiction of the former Supreme and Sudder Courts, abolished by section 8. The authority of the Indian Legislature over the jurisdiction of the High Courts (so far, at all events, as the exercise of that authority might be consistent with Her Majesty's Letters Patent) is here distinctly recognized.

The 11th section is similar in effect. It enacts that, after the establishment of the High Courts, every provision in any Act of Parliament, Order in Council, Charter or Act of the Legislature of India, which had been applicable to the Supreme Courts of Bengal, Madras, and Bombay, shall be applicable to the High Courts, as far as may be consistent with that Act itself, and the Letters Patent to be issued under it, "and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of India in Council." The 12th section contains nothing of importance to the present question.

The Act of 1865 (under which the Calcutta Letters Patent of the 28th December 1865, were actually issued), concludes with an express saving of "the power of the Governor-General in Council at meetings for the purpose of making laws and regulations."

Lastly, by the Letters Patent of the 28th December 1865, (clause 44), it is "ordained and declared that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations."

So far, therefore, from being in contravention of any of the provisions of the Statute 24 and 25 Vict., cap. 104, or of the Letters Patent issued under that Statute (as altered by the Act of 1865), their Lordships find that such an exercise of legislative authority by the Governor-General in Council, as might remove

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any place or territory from the jurisdiction of the High Court at Calcutta, is expressly contemplated and authorized both by those Statutes and by the Letters Patent themselves. Their Lordships, under these circumstances, agree with the High Court, that Act No. XXII of 1869 was, in its general scope, within the legislative power of the Governor-General in Council: and they are, therefore, brought to the consideration of the more limited question, whether, consistently with that view, the 9th section of that Act ought nevertheless to be held void and of no effect.

The ground of the decision to that effect of the majority of the Judges of the High Court was, that the 9th section was not legislation, but was a delegation of legislative power. In the leading judgment of Mr. Justice MARKBY, the principles of the doctrine of agency are relied on; and the Indian Legislature seems to be regarded as, in effect, an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself.

Their Lordships cannot but observe that, if the principle thus suggested were correct and justified the conclusion drawn from it, they would be unable to follow the distinction made by the majority of the Judges, between the power conferred upon the Lieutenant-Governor of Bengal by the 2nd and that conferred on him by the 9th section. If, by the 9th section, it is left to the Lieutenant-Governor to determine whether the Act or any part of it shall be applied to a certain district, by the 2nd section it is also left to him to determine, at what time that Act shall take effect as law anywhere. Legislation, which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may, with quite as much reason, be called incomplete as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an Act of legislation, on the part of the external authority so trusted, to enlarge the area within which a law actually in operation is to be applied, it would seem *à fortiori* to be an Act of legislation, to bring the law originally into operation by fixing the time for its commencement.

But their Lordships are of opinion that the doctrine of the

ajority of the Court is erroneous, and that it rests upon a istaken view of the powers of the Indian Legislature, and ineed of the nature and principles of legislation. The Indian egislature has powers expressly limited by the Act of the Imerial Parliament which created it, and it can, of course, do othing beyond the limits which circumscribe these powers. But hen acting within those limits, it is not in any sense an agent r delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the ame nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, (in which category would, of course, be included any Act of the Imperial Parliament at variance with it,) it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils' Act. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case. What has been done is this: The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by, and responsible to, the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place, and by enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative autho-

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rity, "in the other territories subject to his government." Legislature determined that so far a certain change shoul place; but that it was expedient to leave the time, and the ner of carrying it into effect, to the discretion of the Lieute Governor; and also that the laws which were or might force in the other territories subject to the same Government, such as it might be fit and proper to apply to this district but that, as it was not certain that all those laws and ever of them could with equal convenience be so applied, it w pedient, on that point also, to entrust a discretion to the L nant-Governor. This having been done as to the Garo what was done as to the Khasi and Jaintia Hills? The l lature decided that it was fit and proper that the adj district of the Khasi and Jaintia Hills should also be re from the jurisdiction of the existing Courts, and brought the same provisions with the Garo Hills, not neces and at all events, but if and when the Lieutenant-Gov should think it desirable to do so; and that it was also po that it might be expedient that not all, but some only, of provisions should be applied to that adjoining district. accordingly the Legislature entrusted, for these purposes a discretionary power to the Lieutenant-Governor.

Their Lordships think that it is a fallacy to speak c powers thus conferred upon the Lieutenant-Governor (la they undoubtedly are) as if, when they were exercised, th cacy of the acts done under them would be due to any legislative authority than that of the Governor-General in (cil. Their whole operation is, directly and immediately, and by virtue of this Act (No. XXII of 1869) itself. The p Legislature has exercised its judgment as to place, person, powers; and the result of that judgment has been to leg conditionally as to all these things. The conditions having fulfilled, the legislation is now absolute. Where plenary p of legislation exist as to particular subjects, whether in a perial or in a Provincial Legislature, they may, in their ships' judgment, be well exercised, either absolutely or cond ally. Legislation, conditional on the use of particular p or on the exercise of a limited discretion, entrusted b

Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it: and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it. Many important instances of such legislation in India are mentioned in the opinions of the Chief Justice of Bengal, and of the other two learned Judges who agreed with him in this case. Among them are the great Codes of Civil and of Criminal Procedure (Acts VIII of 1859, XXIII of 1861, and XXV of 1861.)

By section 385 of the Code of Civil Procedure, it is provided that "this Act shall not take effect in any part of the territories not subject to the general regulations of Bengal, Madras, and Bombay, until the same shall be extended thereto by the Governor-General in Council" (not in his legislative capacity) "or by the local Government to which such territory is subordinate, and notified in the *Gazette*." Section 445, in the Code of Criminal Procedure, is precisely similar. And by section 39 of Act XXIII of 1861, when any such extension as that authorized by section 385 of the Act of 1859 is made, it may, with the previous sanction of the Governor-General in Council (not in his legislative capacity), be declared to be "subject to any restriction, limitation or proviso which the local Government may think proper." If their Lordships were to adopt the view of the majority of the High Court, they would (unless distinctions were made on grounds beyond the competency of the judicial office) be casting doubt upon the validity of a long course of legislation, appropriate, as far as they can judge, to the peculiar circumstances of India; great part of which belongs to the period antecedent to the year 1861, and must therefore (as Sir RICHARD GARTH well observed) be presumed to have been known to, and in the view of, the Imperial Parliament, when the Councils' Act of that year was passed. For such doubt their Lordships are unable to discover any foundation, either in the affirmative or in the negative words of that Act.

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Their Lordships will, therefore, humbly advise Her Majesty that the appeal in the present case should be allowed, and the judgment of the High Court reversed.

[REVISIONAL JURISDICTION.]

July 7th.

No. 583 of 1878.

BURKUT HOSSEIN AND ANOTHER . . . PETITIONERS;

AND

MAJIDOONNISSA AND ANOTHER . . . . OPPOSITE PARTIES.

Order made under Act VIII of 1859—*Repeal of Act—Jurisdiction—Execution of Decree—Sale set aside—Act VIII of* 1859, *section* 257—*Act X of* 1877, *sections* 312, 588 *m.*

On the 16th of June 1877, certain property was sold in execution of decree, and on the 29th of June 1877, the judgment-debtor, the owner of the property, applied to the Court to set aside the sale, and the sale was set aside by the Subordinate Judge on the 24th of January 1878. The decree-holder, who was the purchaser of the property, appealed to the Court of the District Judge who reversed the order of the Subordinate Judge. *Held*, that the Judge had no jurisdiction to do so, as the proceedings must be taken to be governed by Act VIII of 1859, and not by Act X of 1877.

Runjit Singh vs. *Meharban Koer*, 2, C. L. R., 391, cited and followed.

RULE to show cause why an order passed by the District Judge of Gya, on the 25th of March 1878, should not be set aside on the ground of want of jurisdiction.

Mr. *C. Gregory*, for Petitioners.
Moonshee *Mahomed Yusoof*, for Opposite Parties.

The facts of the case are sufficiently set forth in the judgment of the High Court (1) which is as follows :—

On the 16th June 1877, the petitioners' property was sold by the Subordinate Judge of Gya in satisfaction of a decree, (in which a balance of Rs. 104 more or less was outstanding) and was purchased by the decree-holder and her pleader for Rs. 120. On the 29th June 1877, the petitioner prayed to have

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the sale cancelled, and brought into Court the sum due under the decree, alleging that the value of the property sold was Rs. 12,000. On the 24th January 1878, the Subordinate Judge cancelled the sale and directed the refund of the purchase money with interest, and allowed the judgment-debtor to pay off the balance due on the decree. On the 25th of March 1878, the District Judge, on appeal, reversed the order of the Subordinate Judge.

It is contended that the Judge had no jurisdiction in the matter. If the proceedings are taken as governed by Act VIII of 1859, the Judge had no jurisdiction. That Act allowed no appeal, and by section 591 of the new Code no appeal from an order (other than a decree) lies, except as provided in Chapter XLIII. Section 588 (*m*) applies only to orders made under the Code and to no other such orders. Therefore, unless the Subordinate Judge's order of the 24th January 1878 was made under the new Code, there was no appeal to the Judge.

The question at issue in this case, though not directly before the Full Bench in the cases disposed of on the 18th June last, is disposed of by the observations of the Judges in those cases. The Chief Justice held, following the Full Bench decision reported in 6 Bombay Reports, 166, that the word "proceedings" in section 6, Act I of 1868, includes all proceedings in a suit up to its final disposal; and that the right of appeal in a suit commenced before the 1st October 1877 stands as it would have been if the Code of 1859 had not been repealed, though the "procedure," which he understands to mean the machinery by which those proceedings are conducted, is after decree to be that provided by the new Code.

Mr. Justice MARKBY, in case No. 26 of 1878, held that, as the proceeding before the lower Appellate Court, that is, the appeal of the decree-holder from the decisions of the Moonsiff, was commenced on the 6th April 1877, before the repealing Act came into operation, the repeal, by reason of section 6, Act I of 1868, did not affect that proceeding, and the order of the Judge, dated 5th October 1877, was held to have been made under Act XIII of 1861, section 11.

Mr. Justice JACKSON summarises his opinion at the close of

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Judgment.

his judgment in three propositions, of which it is now onl necessary to refer to the last. The procedure after decree in suit determined before the Code came into force would thereafte be governed entirely by the Code as to new proceeding but not as to proceedings already commenced, which accordin to the view now suggested are specially protected by Act I (1868.

Taking it then that this statement of the law by Mr. Justi JACKSON is correct, we must hold that the order of the Subord nate Judge, though made after the 1st October 1877, havir been made on an application to set aside the sale which w pending in his Court from before that day, was in fact, by virt of section 6, Act I, 1868, an order made under section 257, A VIII of 1859, and therefore final.

The Judge below holds that the words "under this chapte in section 311 apply to orders made under the similar chapter Act VIII, but the reason he assigns for it has been he to be wrong, in that it ignores Act I of 1868. We mu therefore, hold that the Judge had no jurisdiction under secti 588 (*m*) of the new Code, as the order was not made under se tion 312. The Rule will, therefore, be absolute. The proce ings of the Judge on appeal and his order of the 25th Mar 1878 are quashed, and the order of the Subordinate Jud of the 24th January 1878 is restored.

[CIVIL APPELLATE JURISDICTION.]

RAJA NILMONY SINGH . . . . . PLAINTIFF;

AND

RAM BUNDHU ROY AND OTHERS . . . . DEFENDANTS.

1878 *June 6th.*

No. 148 of 1877.

Res judicata—Lands taken for public purposes—Award of compensation—Regular suit—Act X of 1870, *sections* 37, 38, 39, 40, 58.

When land has been taken up by the Government for public purposes, and a reference is made to the Civil Court by the Collector for an order as to the apportionment of the compensation money amongst adverse claimants, the award of the Judge is, unless appealed from, final and binding on the parties in whose presence it was passed; and a subsequent suit by one of the parties to the compensation case for a declaration of his title to the lands, and for an order directing the payment of the compensation money to him, will be barred as *res judicata.*

Sections 37, 38, 39, 40, 58, of Act X of 1870, discussed.

Dwarka Singh vs. *Solano*, 22 W. R., 38, dissented from; *Kaminee Debee* vs. *Protap Chunder Sandyal*, 25 W. R., 103, distinguished.

REGULAR APPEAL from a decision passed by the District Judge of East Burdwan, dismissing the plaintiff's suit.

This was one of several cases which were tried together, the evidence produced in each being taken as evidence in all. The Raja of Pachete was the plaintiff in all the cases, and the defendants were certain jaghirdars holding jaghirs in his zemindari, portions of whose land have been taken up for public purposes. The plaint in the present case alleged that the value of the land taken up by the Government was fixed at Rs. 15,681-6-6; that the sum was deposited in the Collectorate of East Burdwan; that a reference was made to the District Judge of East Burdwan in order to the apportionment of this compensation; that on the 5th of July 1876, the Judge made an unjust award, giving to the defendants nearly Rs. 14,000. The plaint further alleged that the defendants had no interest in the land, and that the award should have been awarded to the plaintiff; and the present suit was brought to declare the plaintiff's title to the land and for an order directing the payment of the compensation

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money out to him. The defence, so far as the present re concerned, was, that the decision of the Judge in the co sation case not having been appealed from was final, and regular suit was barred under the provisions of section 2 VIII of 1859.

The first issue framed by the District Judge was: Ar suits maintainable? And, having stated that this issue ir "the question whether, as the Legislature has laid down a cular course of procedure for the determination of the ri the parties claiming compensation for land taken for purposes, it is open to them to resort to any other proced the determination of those rights," the learned Judge p as follows:—

In order to decide these questions it will be necessary to exar provisions of the Land Acquisition Act X of 1870. When the usu minary steps decided by the Act have been taken, and the per terested—(see deposition in section 3)—have appeared or have opportunity of appearing before the Collector, a reference is to be the Civil Court (section 15) in the following cases:—

(1.)—If no claimant attends.

(2.)—If the Collector considers that further enquiry as to the n the claim ought to be made by the Court.

(3.)—If any person whom the Collector has reason to think int does not attend.

(4.)—If the Collector is unable to agree with the persons interest have attended in pursuance of the notice, as to the amount of co tion to be allowed.

(5.)—If upon the said enquiry any question respecting the titl land or any right thereto or interest therein arise between or am or more persons making conflicting claims in respect thereof.

This last or fifth clause applies to the present case, for questior respecting certain rights to the land and interest therein between t of Panchkote and the jaghirdars.

Section 18 directs the Collector in making a reference under se to state certain particulars in writing for the information of the Cou

Sections 19 to 36 inclusive are concerned solely with the procedu observed in fixing the amount of compensation to be paid by Gove They contemplate the Government on one side, and all persons in (whether they appeared before the Collector or did not appear until ence had been made to the Civil Court) on the other side, and the of compensation to be paid as the sole question for the determinatio Judge sitting with assessors between the parties thus arranged.

we come to Part IV of the Act which provides for the apportion-
he compensation amongst the parties interested. Section 37 enacts
e persons interested agree as to the apportionment of the compen-
e particulars of such apportionment shall be specified in the award,
tween such persons the award shall be conclusive evidence of the
ss of the *apportionment*. Similarly by Section 14 if the parties
h the Collector as to the amount of compensation, the award is
clusive as to such amount.

38 provides that when the amount of compensation has been
ıder section 14 (*i.e.*, by the parties interested agreeing with the
as to such amount), if any dispute arises as to the apportionment of
or any part thereof, the Collector shall refer such disputes to the
of the Court, a dispute as to the apportionment of the compensa-
arise upon many grounds, and amongst others on the grounds set
he fifth clause of section 15 above quoted, namely, that two or
rsons make conflicting claims in respect of rights to the land or
therein. It would, therefore, appear to be possible that any parti-
ɔ of this class might be referred to the Court under either clause 5
ı 15 or section 38. The latter section can apply only when the
interested agree as to the amount of compensation. Clause 5 of
5 applies whether the persons interested agree or do not agree as to
ınt of compensation, inasmuch as it is connected with clause four
unctive.

ı 39 enacts that when the amount of compensation has been settled
ɔurt, and there is any dispute as to the apportionment thereof, or
reference to the Court has been made under section 38, the Judge
one shall decide the proportion in which the persons interested are
o share in such amount.

sult of the provisions contained in sections 15 to 39 inclusive is
the Court is to exercise jurisdiction over two questions—

he determination of the amount of compensation as between
ent and the parties interested.

he determination of the proportion in which the persons interested
led to share in the amount of compensation as between such

e cases one only of these questions may have to be decided. In
both questions may have to be decided. The first question is
ded by the Judge sitting with assessors; and the procedure to be
set forth in sections 19 to 36. It has been pointed out that
ive cases in section 15 and a sixth in section 38 (which may or
ude one of the previous five), in which a reference may be
Court. These six cases must all come under the two heads of
ementioned. The case put in clause 5, section 15, cannot
first head. It must, therefore, come under the second head;
that in order to decide the proportions in which the persons

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interested are entitled to share in the amount of compensation (either fixed by the Court or agreed to by such persons), the Court has jurisdiction to decide any question respecting the title to the land or any rights thereto or interests therein, which may arise between or among two or more persons making conflicting claims in respect thereof.

I have just pointed out that the Act in sections 19 to 36 lays down the procedure to be observed by the Court in the exercise of the first head of jurisdiction. This procedure consists of certain special rules and of certain portions of the Code of Civil Procedure expressly extended. The Act contains no direction as to the procedure to be followed in the exercise of the second head of jurisdiction, save a brief rule on the subject of appeals (clauses 2 and 3 of section 39.) What procedure is to be observed in the second case, and why has the Legislature while making express provision in the first case been silent in the second case? It appears to me that the explanation is simple. Civil cases of all kinds are in this country tried by a Judge sitting without jury or assessors. When the Legislature enacted that the amount of compensation should be determined by the Judge sitting with assessors, this was an exceptional mode of proceeding, which necessarily required special provisions as to procedure, which accordingly were made in sections 19 to 36 of the Act. The Judge sitting by himself is to determine the proportion in which the persons interested shall share in the amount of compensation. This is the ordinary and usual course of trial in civil matters, and no special rules of procedure were required. The general provisions of the Code of Civil Procedure apply, was made as the Court is only exercising its ordinary jurisdiction. Were it otherwise, section 38 of Act XXIII of 1861 enacts that the procedure prescribed by Act VIII of 1859 shall be followed, as far as it can lie in all miscellaneous cases and proceedings which after the passing of this Act shall be instituted in any Court. The provisions as to appeal in clauses 2 and 3 of section 39 were doubtless necessary, because the right of appeal is a matter rather of substantive than of adjective law. Having regard to the language of section 23 of Act XXIII of 1861, it may well be that the Legislature, in creating a new mode of calling the jurisdiction into action, thought it well to remove all possible doubt by declaring the right and manner of appeal in explicit language: and see Dwarris on Statutes, second edition, pp. 602—603.

It then follows that the Judge, in order to decide the proportions in which the persons interested are entitled to share in the amount of compensation, has jurisdiction to decide any question respecting the title to the land or any rights thereto or interests therein, which may arise between or among two or more persons making conflicting claims in respect thereof (clause 5, section 15); that in deciding this question he is to be guided by the usual procedure of the Civil Courts; and that the person or persons to whom his decision may be adverse have the same right of appeal to superior tribunals which is enjoyed by the parties to ordinary civil s

be the intention of the Legislature that when a question of the ture has been fairly put in issue and tried between persons who ties to the cause, and had full opportunity of bringing forward all nce at their disposal and of resorting to the highest tribunals in gainst the decision of the Court of First Instance, the same ques- it be litigated over again, not before any superior tribunal, but e same Courts or perhaps a Court of inferior jurisdiction? The ich exercises the powers and jurisdiction conferred by the Act is ipal Civil Court of Original Jurisdiction in the district or a judicial ecially appointed by the Local Government to perform the func- a Judge under the Act. If the same question may be litigated n, a Moonsiff may reverse the decision of the District Judge con- n appeal by the High Court. I think it extremely improbable Legislature intended this result. Certainly it has not expressed intention in direct words. If the Act were wholly silent on the if there were no words which by any possible construction could ich a result, I think it could not be contended that a question once a Court of competent jurisdiction could be litigated over again e same Court or a Court subordinate thereto. Section 2 of the ocedure Code enacts that the Civil Courts shall not take cogni- any suit brought on a cause of action, which shall have been heard rmined by a Court of competent jurisdiction in a former suit be- e same parties. It cannot be contended that the Court of the Judge was not a Court of competent jurisdiction, merely the question came before it by reason of certain steps being taken e certain land for public purposes. The jurisdiction to deal with tion brought before it in this way, is not so much conferred by the sumed to exist independently of the Act. In *Mohima Chunder r and another* vs. *Assodhia Dassia*, 15 B. L. R., 251 note, it l that a matter decided in a rent case under Act VIII (B. C.) of *rejudicata*. In that case the matter was brought under the n of the Civil Court by the operation of a special Act. The se appears to me to fall within the same *ratio decidendi*.

id that the proceedings of the District Judge in apportioning the ation were "summary proceedings," and that a regular suit must, be maintainable. The Act does not say, and I find nothing that those proceedings are in any way "summary" or less formal other proceedings in the trial of a civil suit by a Civil Court. al is expressly allowed, the evidence must be recorded at length ction of section 172 of the Code of Civil Procedure), and the e power that I am aware of to exclude any evidence tendered cut short the proceedings in any way. But in truth, the idea *proceedings* which may be questioned over again in a regular n of the old practice which has now become obsolete.

ged that the proviso to section 40 of the Act allows the

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question to be litigated over again. This section is as follows:—"
of the compensation shall be made by the Collector according to t
to the persons named therein, or, in the case of an appeal under se
according to the decision on such appeal. Provided that nothi
contained shall affect the liability of any person who may receive t
or any part of any compensation awarded under this Act to pay the
the person lawfully entitled thereto." It appears to me that, on a
the construction of this proviso, the first person mentioned is
named in the award, and the second person mentioned is a p
named in the award; and that when the Legislature intended by th
was simply this, that the taking the land for public purposes and pa
the value thereof to the persons who had appeared in the pro
under the Act and put themselves forward as the persons intereste
not prejudice the rights of any other person, who might have a bet
to the land, but who did not appear in the proceedings under the
that the compensation-money in the hands of those who recei
to be capable of being followed by such persons just as they mi
proceeded to recover the land. I think this is a more reasonable
tion than to suppose that the words "person lawfully entitled" in
viso were intended to include a person who had been a party to the
ings before the Judge and had been declared by him and by the Hi
on appeal not to be entitled.

The office of a proviso, said Mr. Justice Story, is either t
something from the enacting clause or to qualify or restrain i
rality, or to exclude some possible ground of misinterpretation of it
(see Kent's Commentories, Vol. I., p. 504 note). If the Le
intended to mean by "person lawfully entitled," a person who had j
declared by a competent Court not to be lawfully entitled, and b
give this right to litigate the same matter over again before the
an inferior Court, I cannot think that a proviso would have been
as the mode of indirectly conveying this meaning.

It is a well-settled principle of interpretation, that statutes are t
strued in reference to the principles of the common law, and that it
be presumed that the Legislature intended to make any innovation
common law, unless this intention is clear beyond a doubt (see Kent
mentories, Vol. I. p. 505; Sedgwick on the construction of Statu
Constitutional Law, 2nd ed., pp. 267, *et seq.*; Dwarris on Statutes, 3
504; and the cases quoted by these authorities). In the case of
Singh vs. *Hussain Buksh Khan*, 7 B. L. R., 673, their Lordship
Privy Council speaking of the rule of *res judicata* said, "there is
technical nor peculiar to the law of England in the rule as so ste
was recognized by the Civil Law and it is perfectly consistent with
section of the Code of Procedure." In this and a number of ot
the rule of *res judicata* has been recognized as part of the comm
this country. It ought not to be presumed, in the absence of ob

n of such an intention, that the Legislature intended to make an excep- n to this rule, and allowed a matter once determined to be litigated over in.

Let us now try another interpretation test, that derived from the examina- n of acts *in pari materiâ*. In applying this test, it is well settled that in er to arrive at the intention of the Legislature, repeated acts may be rred to. Section 40 of Act X of 1870 is almost word for word the same section 28 of Act VI of 1857; the provisos in both sections correspond l more exactly. Section 7 of Act VI of 1857 enacted as follows:—"If n the said enquiry any question arise respecting the title to the land or rights or interests therein between two or more persons making con- ing claims in respect thereof, the person deemed by the Collector or er officer to be in possession as owner, or in respect of the rents as being tled thereto shall, for the purpose only of taking such measures as may necessary for fixing the value of the land and the amount of compensa- to be allowed for the same, be held as between such persons to be the son interested in the land." Under these provisions the Government or Collector dealt only with the person in possession. Having regard to fact it appears to me that there can be no doubt as to the meaning of 28th section of Act VI of 1857. The person in possession only was lt with, and the compensation was paid to him, but it was declared that h payment would not affect his liability to pay the amount to any other son, who, though out of possession and therefore excluded by section 7 n being a party to the proceedings before the Collector, might neverthe- be lawfully entitled. The 29th section empowered the Collector in ibtful cases to withhold payment of the money until the parties had ceeded in the Civil Court, and one of them had obtained an order of rt for the payment of the money.

Under Act VI of 1857, the Civil Court had no jurisdiction to determine amount of compensation, but that the Civil Courts in the exercise of ir ordinary jurisdiction had power to determine what persons were itled to the compensation in whole or in part there can be no possible ibt, and the 29th section just referred to assumes this. Comparing the guage of section 7 of Act VI of 1857 with that of clause 5 of section of Act X of 1870, it will be manifest that the question of disputed title, ich the former section got over by dealing with the party in possession, the very question which the Collector is empowered by the latter clause l section to refer to the Civil Court. This reference and the provisions powering the Collector to make it, do not give the Civil Court any new isdiction, for it is clear that they had jurisdiction to deal with the ques- n of title before. What they effect is this, the determination of the stion of title before payment is made of the amount of compensation, ich obviates the possible mischief of payment to the wrong party, and gs the matter to a speedy conclusion much more satisfactorily than the ner plan of the Collector, holding the money until the parties had taken

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their own time to litigate the question of title. I cannot gather fr portion of the Act that the Legislature, which, providing for a exercise of jurisdiction and for the exercise of this jurisdiction by not ordinarily inferior to that of the District Judge, intended in a to limit or confine or diminish the jurisdiction itself which had pr existed. If there were no such intention, then the decision of the Judge was the decision of a Court of competent jurisdiction comp every way, and cannot be called in question over again in the same and the words "person lawfully entitled" in the proviso to section 4 X of 1870, must mean, as they meant in section 28 of Act VI a person having a title. The merits or value have not been inve under the Act. Owing to the change in the law, this meaning wi sarily embrace a much smaller number of persons than before.

Finally, I think it will be found that the Legislature has expre hibited a suit of this nature: Section 58 of the Act (X of 1870) en "no suit shall be brought to set aside an award under this Act." an "award"? Is it merely the determination of the *amount of compe* or does it include the determination as to the *apportionment of co tion* depending, as such apportionment may, upon the decision of a of title? That it includes the latter, will, I think, be clear from se which enacts that "payment of the compensation shall be made Collector *according to the award* to the person named therein, or, in of an appeal under section 39, according to the decision on such If payment is to be made according to the award, it is clear that th must specify the proportions in which the persons interested are to the money. When the parties agree as to the apportionment, the lars thereof are expressly decided by section 37 to be specified in the and therefore become an integral portion of the award; that the sam follows where the parties do not agree, and the Court determines portionment is clear from the references to appeal in section 40, the an appeal only in those cases in which the apportionment has been r the Court. There is no definition of the term "award" in either Ac 1871 or Act VI of 1857, but I may remark that according to secti the latter Act, the award was to set forth "the person entitled to sation and *the proportions in which they are so entitled.*"

For the above reasons I am of opinion that the decision of the Judge on the reference made under Act X of 1870 was the judgm competent Court upon the question now raised, and that it is not either of the parties to that judgment to litigate that question over the present case.

The plaintiff appealed.

Baboo *Chunder Madhub Ghose*, and Baboo *Bhowany Dutt*, for Appellant.

Baboo *Mohiny Mohun Roy*, and Baboo *Anund Gopal Palit*, for Respondent.

The judgment of the High Court (1) is as follows :—

The question which we are called upon to determine in these six appeals touches the finality of a decision of the District Court, or, in case of an appeal, of the High Court as a Court of Appellate Jurisdiction, under section 39 of Act X of 1870, otherwise called the Land Acquisition Act of 1870. In all these cases the subject of dispute is the amount of compensation awarded by the Collector in respect of land taken up for public service, in respect of which compensation a dispute as to the apportionment thereof arose, and a reference was made thereupon under section 38 of the Act, with a view to a decision by the Court—"the Court" meaning, as explained in the definition clause of the Act, "the principal Civil Court of Original Jurisdiction," no other judicial officer having apparently been appointed for that purpose in the District of Burdwan. The parties contending were the zemindars, certain persons called jaghirdars, and other persons having subordinate rights, and by the decision of the Court under section 39, by far the largest share of the compensation went to the jaghirdars. This suit, therefore, was brought by the zemindar to establish his paramount right over that land, and in that way to make himself out entitled to the compensation which the Court had given to the jaghirdars, that is to say, to re-open in a regular suit the precise question which had been settled by the decision under the Land Acquisition Act.

The District Judge of Burdwan, in a very elaborate and learned judgment, has held that such suits will not lie; that the decision of the Court under the Act is final and is not open to be questioned otherwise than by the appeal which the section allows.

The appellant before us contends that the power to question such decision by a regular suit is expressly reserved to him by the proviso to section 40. He urges that the 58th section of the Act on which the Judge relies has no reference to the present question, and he relies on the authority of two cases in this Court to which I shall presently refer. As to section 58, I am inclined

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'ı suit might become final. Some stress was ıant upon the fact, that section 37 in express to certain awards, and declares that, as be- ınterested who may agree in the apportionment ıon, the award should be conclusive evidence of the apportionment; and it was said that, if the ıtended to give finality to the decision of the section 39, the intention would have been ex- terms. Somewhat similar use was made, at ıd it to have been made, of the terms of section was contended that whereas that section forbids a suit to set aside an award under the Act, it the bringing of a suit to set aside the decision of pprehend that what is intended by the terms of of section 58, is nothing more than this, awards made under the Act by express legis- the same footing of finality as a decision of the section 39 is by the ordinary principles of law.

ended that the jurisdiction of the Court to entertain barred by section 1 of Act VIII of 1859, except press provision of the law. In the first place Act X ın Act subsequent to Act VIII of 1859, and contains, ırs to me, abundant evidence of the intention of the that all proceedings in regard to land acquisition ensation should be conducted under the Act and not . In addition to that, it seems to me that section 2 ar the bringing of the present suits inasmuch as the f action, if there be any, on which the suits proceeded, ın already determined by a Court of competent jurisdic- the manner provided by the law. I think, therefore, that, he construction of this Act, a decision of the Court, if ppealable—and if there is an appeal, then the decision of ppellate Court,—is final and not liable to be contested by t.

e have then been referred to two cases in which the learned ges of this Court are said to have entertained a different ion. The first of these cases is printed in 22 W. R., 38— *rka Singh* vs. *Solano* and another. That is the decision of

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of a single Judge of this Court in special appeal in a case not exceeding Rs. 50 in value; and, although such a decision of this Court is entitled to the greatest respect, it is not, it must be admitted, so binding upon a Division Bench as to compel a reference to the Full Bench. I have read and considered the opinion expressed by the learned Judge, Mr. Justice AINSLIE, whose opinion, I need not say, is deserving of the greatest attention, but I am unable to concur in the view which he has expressed. That opinion is stated in these words. After discussing various sections of the Act he says:—" I hold that the order of distribution is not a final order or adjudication of the rights of the parties to the proceedings under the Land Acquisition Act to the property for which compensation has been assessed and awarded. Were it otherwise, it seems to me that questions involving title to properties, of which the land taken for public purposes might be a trifling fraction, would be finally adjudicated in proceedings under the Act—a result which cannot have been contemplated by the Legislature." That in all respects appears to me a reason which would be applicable to every decision in which the rights of an important or extensive character came to be adjudicated, although the particular subject before the Court happened to be of a small value. That is a state of things which constantly arises. As to the nature of the inquiry, I have already said that an inquiry in a land acquisition case is, or should be, just of as careful and formal a character as any in a regular suit.

The other decision referred to is, that of a Division Bench printed in 25 W. R., 103, in the case of *Kaminee Dabia* v. *Protap Chunder Sandyal.* The judgment is delivered by Mr. Justice MACPHERSON, on appeal against a judgment of Mr. Justice MCDONELL; but I think it clear that in that case the question now before us was not in any shape brought before the Court. That was a suit to recover from the defendants the sum of Rs. 20 which had been paid to one of them as compensation awarded under the Acquisition Act, and also to have the plaintiff's title declared to two cottahs of land which she claimed. There is nothing to show that the plaintiff had been one of the parties before the Court on the question of apportionment

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compensation. The learned Judges observe :—"The award under the Land Acquisition Act cannot be in any way affected by this suit; and therefore section 58 of the Land Acquisition Act cannot apply." This case, therefore, may be dismissed from consideration as not bearing on the question before us. I think, therefore, that this question is not concluded by authority in any shape, and, as our opinion is quite clear upon this point, we affirm the judgment of the Court below in these six appeals which are dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

JADU DASS MOHUNT . . . . . PLAINTIFF;

AND

A. B. SUTHERLAND AND OTHERS . . . . . DEFENDANTS.

June 7th.

No. 221 of 1878.

Share of Rent, Suit for—Arrears of Rent, Suit for share of—Payment of Rent Jointly—Joint lease.

A tenant who has taken a lease from joint owners, to whom he has paid the rent jointly, may be sued by one of his co-lessors for the latter's share of arrears of rent, the other co-lessors being made defendants.

Doorga Churn Surmah vs. *Jampa Dossee*, 21 W. R., 46; and *Tara Chunder Banerjee* vs. *Ameer Mundul*, 22 W. R., 394; cited and followed.

SPECIAL APPEAL from a decree passed by the Judge of Burdwan, reversing that of the Moonsiff of Raneegunge. The facts of the case are as follows:—

Nilambur Dass was the original putnidar of certain mouzahs, and he executed a will in favour of the plaintiff and the *pro-forma* defendants, Redoy Manji and others, by which he bequeathed the talook to the plaintiff and his co-sharers in certain specified shares, the plaintiff being appointed as Mohunt of the Akras maintained by Nilambur Dass. The defendants, Messrs. Simpson & Co., took two leases from the plaintiff and his co-sharers, one consisting of 146 beegahs of land at a jumma of Rs. 511, and another of 59 beegahs at a jumma of Rs. 83, and obtained pottahs on the 11th and 16th of November 1869 (27th Karick, 2nd Aughran, 1276). The plaintiff sues to recover his share

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Judgment.

of the rent respecting these two jummas from the year 1280 to the year 1282, and he states that the *pro-formâ* defendants have been colluding with the principal defendants, and have refused to join him in bringing this suit.

Messrs. Simpson & Co. stated that the plaintiff, being a man of bad character, was displaced from the Mohuntship by Redoy Manji and others (the *pro-formâ* defendants), who were authorized thereto by the will of Nilambur Dass, and one Huri Dass Mohonto was appointed in his stead; and that no coal being found in the jummai lands, the plaintiff, his successor, and his co-sharers remitted the rent of 1280 and 1281, and granted an abatement of Rs. 100 in the rent of 1282. The Court of First Instance gave a decree for the plaintiff for his share of the rents for 1281 and 1282, but this decision was reversed on appeal. Plaintiff then brought this special appeal.

Baboo *Rash Behary Ghose*, and Baboo *Juggut Chunder Bannerjee*, for Appellant.

Orr, for the Respondent. Baboo *Omurrath Bose*, with him.

The judgment of the High Court (1) was delivered by

JACKSON, *J.*

JACKSON, *J.*:—

The plaintiff alleged that, under the will of Nilambur Dass, he and the *pro-formâ* defendants were in joint possession of certain mouzahs, the share which devolved on plaintiff from his father being 3 annas 4 gundas; that the principal defendants, Sutherland and others, took in Kartic, 1276, a lease of 146 beegahs of land out of these mouzahs at a rental of Rs. 511, and a further lease in Aughran of the same year of 59 beegahs of land at a rental of Rs. 83, altogether amounting to Rs. 594; that the defendants not having paid the plaintiff rent for the years 1280 to 1282, he requested the *pro-formâ* defendants to join him in a suit against the principal defendants for the recovery of Rs. 447, being his share of the rent for those years; but, they having refused to join him in the suit, and having colluded with the principal defendants, he brings the present suit for the above amount, being his share of the rent.

(1) JACKSON and TOTTENHAM, *J.J.*

The first question raised by the defendants at the trial before the Moonsiff was, whether the plaintiff's suit, framed as it was, could be maintained. The Moonsiff, referring to various authorities, came to the conclusion that this suit might be maintained. He then went into the evidence and found that as to part of the rent the defendants made out payment, and as to part valid remission, and he considered that the plaintiff was entitled to recover rent for the years 1281 and 1282 from the defendants, and made a decree accordingly for Rs. 284.

Both parties appealed, and the first question taken before the District Judge on the defendant's appeal, viz., that the plaintiff had been dismissed from his post of Mohunt, failed. The second ground was, that the suit could not be maintained, and the Judge decided this point in favour of the appellants.

Mr. Field refers to no authority but that of his own decision. This is a question which has been repeatedly before the High Court,—both the Full Bench and Division Benches,—and it would have been well if he had examined authorities which are equally binding upon him and upon other Judges in these provinces. Two cases have been brought to our notice to-day, and they are cases with which we are familiar. One was decided by a Full Bench, and is printed in 21 W. R., p. 46—*Doorga Churn Surmah* vs. *Jampa Dossee*. In that case the head note is: "A suit by a co-sharer for arrears of rent which she had heretofore received in proportion to her share, but which she alleged now to be withheld by the ryot in collusion with the other co-sharers, who were also made defendants, was held to be properly maintainable." The learned Chief Justice, in referring to the Full Bench, says: "The plaintiff in this suit is one of three co-sharers in an eight-annas share of rent, payable by a ryot, Doorga Churn Surmah, and she brought a suit against him and the other co-sharers for her share of the rent, alleging that they were colluding with him. Doorga Churn Surmah's defence was, that he never paid any rent to the plaintiff, and that he had been paying rents to the agents of Gour Chand and Lall Chand, the other defendants," and so on. The learned Judges delivered different judgments, but in my own judgment in that case I find these observations: "The owners, it is true, have

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JADU DASS MOHUNT v. SUTHERLAND.

Judgment.

JACKSON, J.

been accustomed to collect the rents jointly (at least I understand that to be the finding) and by a joint agent; but the parties who have been made defendants along with the ryot, had subsequently taken from the ryot with his consent, their own separate shares of the rents, and the suit which the plaintiff brought was in effect a suit to recover an arrear, which arrear corresponded with her own share of the rent which the ryot had vexatiously and collusively refused to pay. That amount still remained unpaid, and the plaintiff being entitled to it, it seems to me that she was justified in bringing this suit, making at the same time the other co-sharers parties as defendants. In point of fact, the conduct of the defendant was not that of a ryot who complained of being subjected to several suits in respect of one claim; it was that of a ryot entering into a collusion with two out of three co-sharers, for the purpose of depriving the third." Mr. Justice GLOVER thinks that, under the circumstances of the case, the suit was maintainable, and for the reasons given by Justices KEMP and JACKSON. Mr. Justice PONTIFEX says: "Under the circumstances of this case, I think there is no doubt whatever that this suit is properly maintainable;" and the learned Judge goes further and says: "As at present advised I am not prepared to say, when a ryot is holding under co-sharers but not under a written contract, that one of the co-sharers cannot sue separately for his share of the rent if he makes the other co-sharers defendants;" and the learned Chief Justice concurs.

In another case, decided only six months after, which is to be found in 22 W. R., p. 394—*Tara Chunder Banerjee* vs. *Ameer Mundul*, we find the learned Chief Justice Sir RICHARD COUCH saying in page 395: "Nor does he suggest that he has already paid all the rent except what would be receivable by the plaintiff as his share. Such a case might occur, and then it would probably be open to the co-sharer who had not been paid to sue asking to have the balance which remained unpaid and to the whole of which he would be entitled paid to him. That is not the case here." So that the learned Chief Justice, probably adverting to what had been held in the Full Bench case, recognized a state of circumstances in which a plaintiff would be

allowed to maintain a suit, to which his co-sharers as well as the tenants were parties defendant, for his share of the rent, and particularly in cases where the amount for which the suit is brought in fact represents the unpaid balance of rent.

Now, apart from the other peculiar circumstances of the present case, that is exactly what has occurred here. We find that, if the amount of remission which the co-sharers, other than the plaintiff, had consented to be treated as payment (and of course it must be taken as a payment in respect of their interest only, the plaintiff not having agreed to it), then the amount which the plaintiff may claim will represent the amount of unpaid balance to which he himself is entitled. The circumstances besides were very peculiar. The principal defendants had obtained from the other co-sharers a remission of their rent, and this remission being obtained during an interval of time when the present plaintiff had been ousted from possession of his share, on the ground that he had been dismissed or expelled from his office of Mohunt, the person who displaced him joined with the other co-sharers in granting the remission. That being so, there really seem to be circumstances in the case which might have justified the bringing of this suit, even if the coincidence which I have mentioned between the amount paid and the amount of unpaid balance did not exist, and under any circumstance I should have thought the preferable course to take would be to allow plaintiff to amend his plaint, so as to make the suit one for the whole unpaid amount of rent.

Taking this view of the case, we think that the judgment of the District Judge is erroneous, and in so far as it reverses the judgment of the Moonsiff, it ought to be set aside and the judgment of the Moonsiff restored with costs.

As to the cross-appeal, the Judge says: "I see no reason to differ from the Moonsiff's finding as to the acquittance for the year 1280. There is evidence to prove its execution (see testimony of Huri Dass), and the plaintiff has not thought fit to go into the witness box loose and deny its genuineness." As to this it appears—and the respondent before us admits—that the Judge has fallen into an error, inasmuch as the plaintiff did go into the witness box and deny the genuineness of the acquit-

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tance in question. As far as that part of the case is concerned, it will go back to the lower Appellate Court, in order that that question of fact may be tried. On this part of the case the costs will follow the result.

[CIVIL APPELLATE JURISDICTION.]

June 14th.

No. 553 of 1877.

ABDOOL BARI . . . . . DEFENDANT;

AND

RAM DASS COONDOO . . . . . PLAINTIFF.

Co-partner—Revenue Sale—Default in payment of Revenue—Act XI of 1859, section 53.

Plaintiff purchased at an auction sale in the Civil Court certain mouzahs held by the owner of a revenue-paying estate. Before the sale was confirmed default was made in the payment of revenue, and a mehal (of which the villages formed part) was sold by the Collector and purchased by the plaintiff, the sale taking place after the purchase of the mouzahs had been confirmed. *Held*, that the plaintiff was a co-partner within the meaning of section 53 of Act XI of 1859, and that he took his purchase subject to all existing incumbrances.

SPECIAL APPEAL from a decree passed by the Judge of Sylhet, affirming that of the Subordinate Judge of that district.

This was a suit for possession of certain lands situated within plaintiff's mehal. In execution of a decree for debt against the former zemindar, Krishna Churn Dass, the plaintiff, purchased some lands in a few villages pertaining to the mehal in the year 1862. After the sale certain objections were raised by the judgment-debtors which delayed the confirmation of the sale till the 9th of February 1863. Previously to this, namely, on the 19th of January 1863, the Government revenue for the zemindary became payable, and default having been made, the mehal was sold by the Collector and purchased by the plaintiff in the name of his servant Shorut Chundra Surma, on the 29th March 18[illegible] The defendant held a jote in the mehal, and it was for possession of the lands comprised in this jote that the present suit was brought on the 9th of March 1875. The defence was *inter alia* that the plaintiff was a co-sharer at the time he purchased the mehal in March 1863, and that therefore, under section 53,

Act XI of 1859, he took his purchase subject to all existing incumbrances. The Court of First Instance gave plaintiff a decree which was not held on appeal; defendant then especially appealed to the High Court.

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v.
RAM DASS COONDOO.
Judgment.

Moulvie *Serajul Islam*, for Appellant.
Baboo *Bhyrub Chunder Banerjee*, for Respondent.

The judgment of the High Court (1) is as follows:—

The object of the present suit was to recover from the defendant certain land which he (defendant) was holding within the talook purchased by the plaintiff at a revenue sale on the 29th March 1863. As the case comes before us in special appeal, the defendant claims the benefit of section 53 of Act XI of 1859, it having been found that the defendant is a non-resident cultivating ryot, having in that capacity also a claim to be protected under section 37 of the same law. The Courts below have decided against him on both grounds, and the chief point which we have to consider is, whether section 53 really applies to the present case or not. The facts are these: Previous to the revenue sale, and previous to the occurring of the default which brought about the revenue sale—a default which had arisen from non-payment of the revenue payable on the 19th January 1863—the plaintiff had purchased at an auction sale in the Civil Court of Sylhet certain mouzahs which were held and enjoyed by the Zemindar Krishna Churn, in the year 1269, that is to say, about the latter part of 1862. That sale, however, was not immediately confirmed because objections were raised, and the confirmation of the sale took place on the 9th February. It is urged, and perhaps truly, that the objections were abandoned by reason of a default in the payment of revenue having occurred. It may also be true that default in the payment of revenue had taken place by reason of the execution sale. But in any case it is clear that the plaintiff, when he bid for this property at the revenue sale, viz., in March 1863, was at that time, by virtue of a sale which had been finally confirmed in execution of decree, [illegible] of the rights of one of the co-sharers in the estate, that

(1) JACKSON and TOTTENHAM, *J. J.*

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Judgment.

is to say, a co-partner; and I think it also clear that in v such co-partnership, although the certificate of sale was his hands, he might, if he chose, on or before the 19th 1863, have paid in the amount of revenue due on th That being so, it appears to me that the case comes wi plain provisions of section 53, and that plaintiff was a who was an unrecorded co-partner in an estate and who pu in March, although the purchase relates back to Janua estate of which he was the co-partner. That being so, the estate subject to all its incumbrances existing at the t sale, and did not acquire any rights in respect to under- or ryots, which were not possessed by the previous pro at the time of the sale in execution. Taking this view case, I think the judgment of the Court below must aside, and the plaintiff's suit dismissed with costs.

We understand this decision to be sufficient for the pu of present appeal. If the tenure of the defendants is suc the previous owner could have evicted them after notice of course it will be open to the now plaintiff to take an which his predecessor might have taken.

[CIVIL APPELLATE JURISDICTION.]

EDOY KISSEN DUTT . . . . . DEFENDANT;

AND

AM COOMAR SEN AND OTHERS . . . . . PLAINTIFFS.

1878 *June 19th.*

No. 2647 of 1877.

Under tenure, Sale of—Sale in Execution of Decree—Arrears of Rent—Enhancement.

A sale in execution of a decree for arrears of rent (at an enhanced rate) of a subordinate talook, which has been obtained against a party who is in possession of the talook by permission of the owners, but who has no other right or title to it, will not bind those owners, even though their names be not recorded as tenants in the books of the zemindar.

Shamchand Kundu vs. *Brojonath Pal Chowdhry*, 12 B. L. R., 484, distinguished.

PPEAL from an appellate decree passed by the Judge of Tip-ah, modifying that of the Subordinate Judge of that district. The suit was for setting aside a sale on the ground of fraud, for a declaration of title to a subordinate talook, within the indari of Maharajah Bir Chunder Manickya Bahadoor. Ac-ding to the plaint, this talook was settled with two persons, nknath Dey and Charun Duffadar, in 1256 (1852), and was rtly afterwards purchased from them by the ancestors of the ntiffs Ram Kumar Sen, Gopinath Sen, Lokenath Sen, and by Anundomoye, whose interests passed by inheritance to the ntiff Bhuggobuti Dassi. It is alleged, that in 1872 the agents e Maharajah defendant obtained a fraudulent decree for rs of rent at an enhanced rate against the defendant Anundo-, who was a niece of the Anundomoye abovementioned, and by permission of the plaintiffs, remained in possession of the from the time of her aunt's death till after the decree of In execution of this decree the talook was sold to the dant Redoy Kissen Dutt, and in the beginning of 1875, it was instituted against the purchaser and the Maha-Anundomoye being made a *proformâ* defendant—to the sale set aside, and for a declaration of title.

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Judgment.

The Court of First Instance decreed the case, but this deci was reversed on appeal, the Judge holding that the laches of plaintiffs in not having their names recorded as tenants in zemindar's books debarred them from having the sale set a But he gave them a declaratory decree, the effect of whic considered would be to put the plaintiffs in the position of faulters whose tenure had been lost by their own laches. special appeal the case was remanded to the Judge who adh to his decision. The defendant again specially appealed to High Court.

Baboo *Mohiny Mohun Roy*, and Baboo *Aukhil Chunder Sen* Appellant.

Baboo *Nullit Chunder Sen*, Baboo *Bharut Chunder Dutt*, Baboo *Doorga Mohun Doss*, for Respondent.

The judgment of the High Court (1) was delivered by

MACLEAN, *J.*

MACLEAN, *J.*:—

[His Lordship stated the facts above set out, and continued:

The case was contested by defendant No. 3, (the purchaser,) maintained that the defendant Anundomoye was rightful ov and in possession up to the date of sale in 1873. Defendant N (the Maharajah) also defended the suit, alleging that the de for rent against defendant No. 2, and the subsequent sal execution, were all regular and *bonâ fide*.

The Subordinate Judge found that the decree and sale fraudulent, and that defendant No. 2 had neither title nor session of the talook, and he decreed the case, being sati with the plaintiffs' proof of title and possession. The Dis Judge on appeal reversed the Subordinate Judge's decision. concurred with the Subordinate Judge in respect of the plain title, but finding that they had never registered themselves i books of the zemindar (defendant No. 1), and had never been cognised by him as tenants, he held that the zemindar was just in suing the parties he found in possession, and that there no fraud in his having done so. He held that defendant N was an innocent purchaser, and that plaintiffs had been negl in protecting their own interests, and dismissed the suit.

(1) MACLEAN, *J.*

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REDOY KISSEN DUTT v. RAM COOMAR SEN.

Judgment.

MACLEAN, J.

On appeal to this Court by the plaintiffs, the case was remanded for a decision on the plaintiffs' title, and as to Anundomoye's possession in 1873; and in the judgment now appealed against, the Judge points out that he had previously affirmed the decision of the Subordinate Judge in favour of plaintiffs on the question of title. He finds that Anundomoye was in possession, but seems to say that there was no hostile possession against the plaintiffs. He, therefore, gave them a decree as prayed for declaratory of their title.

The auction-purchaser has appealed against this decision, but we think it is one which cannot be set aside. The decree in execution of which the special appellant purchased the talook was passed against Anundomoye, defendant No. 2, and it has been found by the Courts below that she had no title to it, neither was she the registered tenant. Under these circumstances, the special appellant could not acquire any title to the property by his purchase. The District Judge has evidently overlooked a material distinction between this case and the case quoted by him—*Samchand Kundu* vs. *Brojonath Pal Chowdhry*, 12 B. L. R., 484. In the latter, the zemindar obtained his decree against the registered tenant, whereas in this case the decree is neither against the registered tenant nor the rightful owner of the talook.

We are, therefore, of opinion that as the plaintiffs have a good title to the talook, the sale in execution of the decree against Anundomoye has not passed the talook to the special appellant, and we therefore dismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1878 June 25th. — No. 94 of 1877.

NIRUD KRISTO ROY . . . . . PLAINTIFF;

AND

WUMA NATH MUKERJI . . . . . DEFENDANT.

Local Investigation—Commission—District Judge, Powers of.

Where a Subordinate Judge, in a suit depending in his own Court, issues a commission for a local investigation at the instance of the plaintiff and with the consent of the defendant, the District Judge has no power to interfere with or prevent the execution of that order.

REGULAR APPEAL from a decree passed by the Subordinate Judge of Furreedpore.

Baboo *Taruck Nath Dutt,* and Baboo *Sree Nath Dass,* for Appellant.

The Respondent did not appear.

The facts of the case, (which is here reported on a preliminary point,) are sufficiently set forth in the judgments of the High Court (1), which are as follows :—

MARKBY, *J.* MARKBY, *J.* :—

In this case the Subordinate Judge of Furreedpore, upon the application of the plaintiffs, and without any opposition on the part of the defendants, instructed an Ameen to prepare a map of the land in dispute, and to show by a distinct line if the land decreed to the plaintiff in a former suit was identical with any portion of the land now in dispute. The Ameen was also directed to check the map filed by the defendants, and show the result of it by a line of different colours in his own map. He was further directed to report, whether the boundary set forth in the plaint was correct or not, and to ascertain the value of the land according to the profits of it. The last instruction was only in order to dispose of the objection made as to stamp duty. The

(1) MARKBY and PRINSEP, *J.J.*

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NIRUDKRISTO ROY v. UMA NATH MUKERJI.

Judgment.

MARKBY, J.

was in fact a commission issued for the benefit, both of the plaintiff and of the defendant. Unfortunately, the District Judge seems to have thought, *first*, that he had a right to interfere with the Subordinate Judge in a suit pending before the Subordinate Judge, which he clearly had not; and, *secondly*, he seems to have interfered in a manner which, even if he had a right to interfere, was manifestly wrong. A circular order of this Court, No. 41, dated the 2nd October 1866, (1) directs that an Ameen may be deputed in a case were it is necessary to ascertain by mesurement disputed areas of land, or to ascertain whether particular lands are identical with the lands detailed in documents when the fact is disputed, and in such like instances. This is clearly an instance of the kind mentioned in that circular order. The result of this interference by the District Judge was to deprive the parties of the evidence which they had expected would be derived on the issue of the commission to the Ameen, and the Subordinate Judge had no alternative but to dismiss the suit, as it would have been unbecoming in him to disregard the order of the District Judge. But, though the Subordinate Judge was constrained to make the order which he did make, we have no doubt that that order was illegal and wrong, and ought to be set aside. The commission which had issued ought to have been returned. The result is, that we set aside the order of the Court below, and send this case back with directions that the Ameen should complete his investigation, and when he has made his report, the Subordinate Judge will hear what other evidence the parties may offer in the case and then dispose of it. Costs will abide the result.

PRINSEP, J.

PRINSEP, J. :—

In this case it is obvious that a local inquiry was necessary, in order that the land, the subject of dispute, should be properly identified, and that this Court should thus be enabled to arrive easily at a proper decision. The Subordinate Judge on the application of the plaintiffs, and apparently with the consent of the defendants, ordered a local inquiry by the Ameen on the points that have been already indicated in the judgment which

(1) Field's Circular Orders of the High Court, page 177.

[illegible] Then, another [illegible] the Court on the same [illegible] and states that [illegible] afford the Zillah Judge [illegible] himself that the general directions [illegible] carefully attended to, and not as i[illegible] the Judge's sanction to the local or [illegible] should be commenced: on the contrary [illegible] ordering an inquiry under section 189 of [illegible] Code rests entirely with the Court before which the suit is pending. Having these two circular orders before

(1) 5 Bengal Law Reports, Rules, &c., p. 20.

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the District Judge clearly acted without any authority at all in interfering with the orders of the Subordinate Judge. The terms of the District Judge's order go further than this, for he takes it on himself to comment on the issues that were drawn up by the Subordinate Judge for the trial of the suit. In fact the Judge seems to have constituted himself a general Court of Revision, a position which is not recognized by law.

[CIVIL APPELLATE JURISDICTION.]

KALLY DOSS BHADURY . . . . . JUDGMENT-DEBTOR;

AND

GOLAM ALLY CHOWDHRY . . . . DECREE-HOLDER.

June 27th.

No. 101 of 1878.

Execution of Decree—Co-sharer of Judgment-debtor—Execution by Co-sharer.

A mortgaged certain property to B, and afterwards sold a two-annas share thereof to C, and gave him an *ijara* of a portion. B obtained a decree on his mortgage, which decree was purchased by C, who then applied for execution. The judgment-debtor, A, objected that C was not competent to take out execution, being a co-sharer and an ijaradar, but this contention was overruled.

APPEAL from an order passed by the Subordinate Judge of Furreedpore. The judgment appealed from is as follows:—

"This was an application for execution made by Golam Ally Chowdhry, as decree-holder by purchase, substituted in the place of the original decree-holder. The judgment-debtor contends that the said Chowdhry is not competent to take out execution of the decree, because he, the said Chowdhry, purchased a two-anna share of the mortgaged property covered by the decree, and also obtained a six-annas share thereof on an *ijara* title. Consequently, he having purchased the decree, the purchase money should not be considered as payment in respect of the purchase made by him, but as a payment made towards the satisfaction of the decree. But this argument does not appear to be sound; nor is the agreement supported by any law or precedent. It is, therefore, ordered that the objection made by the judgment-debtor be disallowed."

The judgment-debtor appealed to the High Court.

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KALLY DOSS BHADURY v. GOLAM ALLY CHOWDHRY.

Baboo *Kally Mohun Doss*, and Baboo *Kashi Kant Sen*, for the Appellant.

H. Bell, for the Respondent. Baboo *Rash Behary Ghose*, with him.

Judgment.

The judgment of the High Court (1) was delivered by

MARKBY, *J.*

MARKBY, *J.* :—

We think that this appeal must be dismissed. The property was mortgaged on the 25th of December 1869 to one Goluck Chunder Roy Chowdhry. On the 24th of December 1874, one Golam Ally Chowdhry purchased a two-annas share from one of the mortgagors: and, on the 8th of January 1875, he took an *ijara* lease, for a term, of a six-annas share from the same mortgagor. On the 25th of May 1877, the mortgagee obtained a decree for his mortgage debt, and immediately afterwards took proceedings to bring the mortgaged property to sale. After these proceedings had proceeded as far as the sale proclamation, Golam Ally Chowdhry purchased the decree; and, on the 20th November 1877, he was placed upon the record as a decree-holder. He then applied that execution should go on, and that the property should be sold. On the 9th March 1878, shortly before the date fixed for the sale, the judgment-debtor put in a petition of a very vague character. He seems to ask that execution should not go on in the form in which it was then sought to be carried out; but the only substantial reason which he seems to have assigned why execution should not go on was, that Golam Ally Chowdhry either by purchasing a two-annas share, or by taking an *ijara* lease of a six-annas of the property mortgaged, or by these two things combined, has made himself a joint judgment-debtor. The lower Court refused to stay the proceedings, and the property was sold.

At one time, in the course of the argument, we were disposed to think that the proceedings might be defective in this, that it was not made clear what the property was which Golam Ally Chowdhry, the present decree-holder, intended to sell; and, as there is an affidavit upon the record which states that the pro

(1) MARKBY and PRINSEP, *J.J.*

was sold at an enormous sacrifice, we should have been ıg to give effect to any objection which really exist to these edings. But it has been distinctly stated here, on the part ılam Ally Chowdhry, that he sold the whole of the sixteen of the property clear of what might be called subsequent nbrances, that is to say, his purchase of two-annas share ıis *ijara* lease for six annas. No doubt that is the right ı the mortgagee would have; and, on referring to the edings, we think that they bear out that contention, and vhat really was sold was the sixteen annas of the property of both Golam Ally Chowdhry's purchase of two-annas ıis *ijara* lease for six annas. That being so, as I under- the matter, both that purchase and that *ijara* lease have to nothing, and Golam Ally Chowdhry now holds the rty exactly in the same way as a mortgagee who has pur- d under the decree obtained upon his own mortgage. ther or no that may give any right to the mortgagor in some proceedings to enable him still to redeem the mortgage or mpel the mortgagee to account to him upon the principle down by Mr. Justicê MACPHERSON in 5 B. L. R., 450— *ıai Dabi* vs. *Ramlochun Sircar*, and frequently adopted since, t a matter which we are called upon now to decide.

seems to us that there is no ground upon which we can say the Court below was wrong in refusing to stay proceedings ıis execution; and that the sale which has taken place since rder was made ought to be set aside. The appeal must be ised with costs.

[CIVIL APPELLATE JURISDICTION.]

1878
July 15th.

No. 146 of 1877.

ROBERT WATSON & CO. . . . . PLAINTIFFS;

AND

GONESH CHUNDER SHAOO AND KHETTRO MOHUN BESHOYE . . . . } DEFENDANTS.

Estoppel—Notice—Mortgage of Jote—Under-tenure—Sale of Tenure—Foreclosure—Registration—Execution of Decree—Possession—Transfer of Names—Act VIII (B.C.) of 1869, *section* 26.

When the mortgagee of a jote obtains a foreclosure decree, it is his duty, under section 26, Act VIII (B.C.) of 1869, to have his name registered in the lessor's sherishta.

A, the holder of a transferable jote, mortgaged his interest to B. Subsequently A's landlord having obtained rent decrees against A for the rent of two successive years, sold and purchased A's right, title and interest in the jote in execution of one of the decrees, and entered into possession. Thereupon B, who had previously foreclosed his mortgage, brought a suit for possession against A and his landlord and obtained a decree in execution of which he got into possession. Subsequently, the landlord, in execution of the second rent decree obtained against A, sold and purchased the tenure itself, of which B was then in possession. *Held*, that the landlord was entitled to possession of the tenure as against B; and that, under the circumstances, he was not bound to give B formal notice of the second decree.

Nobin Kishen Mookerjee vs. *Shib Pershad Pattuck*, 8 W. R., 9 considered.

SPECIAL APPEAL from a decree passed by the Judge of Midnapore, modifying that of the Subordinate Judge of the district.

Suit for possession of jote, formerly in possession of Khetro Mohun Beshoye, the registered tenant, but at present in possession of Gonesh Chunder Shaoo, to whom it had been mortgaged by Khettro Mohun. The Court of First Instance gave a decree against Gonesh Chunder, but dismissed the suit with costs as against Khettro Mohun. Gonesh Chunder appealed

to the Court of the District Judge, who delivered the following judgment :—

The subject of the suit is an under-tenure. The defendant, appellant, obtained possession of it by the foreclosure of a mortgage executed in his favor by the former holder of the tenure Khettro Mohun Beshoye. The plaintiffs, who are ijaradars of the mehal, held two decrees for arrears of rent for the years 1278 and 1279 against the tenant Khettro Mohun. A few days after the issue of the notice of foreclosure in Assar 1279, the plaintiffs in execution of the first of their two decrees, attached the tenure and caused Khettro Mohun's right, title and interest therein to be sold. They themselves became the purchasers and obtained possession of the tenure in Bhadro of the same year.

They, however, took no steps to pay off the mortgage, of which they had notice at the time of the sale. After the expiry of the year of grace, the appellant brought a suit for possession against the mortgagor and the plaintiffs who were then in possession. He obtained a decree in Pous 1282—December 1874—but did not take possession from the plaintiffs till the 9th of Jeyth following. Nor had he in the meantime caused his name to be registered in their serishta. After the decree in the foreclosure case had been passed, the plaintiffs proceeded to execute their second decree against Khettro Mohun for the arrears of rent of 1279. And they then applied for the sale of the tenure itself and not merely of the defaulter's right and interest in it. The latter had been already sold under the previous decree, and the plaintiffs had purchased it. In execution of second decree they also purchased the tenure itself in Cheytro 1282, and in pursuance of that purchase they sought to take possession on the 28th of Bysto. But in the meantime the appellant had obtained possession by virtue of the foreclosure decree. He resisted the plaintiffs, and his claim under section 269 of Act VIII, 1859, was allowed.

The present suit was, therefore, brought by plaintiffs to obtain possession on the ground that their purchase of the tenure in execution of a decree for rent entitles them to set aside any encumbrance created by the defaulting tenant.

It was objected by the defendant, appellant, that the suit was barred by section 2, Act VIII, 1859; and that the right, title and interest of the defaulting tenant having already been sold in execution of one of the plaintiffs' decrees, the same tenure could not be sold again in execution of the other against the same debtor who had ceased to have any interest

In the memorandum of appeal, another plea is urged, *viz.*, that the sale-certificate of the second sale does not show that anything more than the debtor's right, title and interest in the tenure were sold, and these had ceased to exist at the time of the sale. This plea was not however pressed, and in fact, as observed by the lower Court, it is clear that it was

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Statement.

the tenure itself which was put up for sale, though the certificate was i correctly drawn up.

I do not find that the lower Court gave any judgment on the issue wheth the suit was barred by section 2. It, is therefore, necessary to say that. think that section has no application to this suit. The appellant sought t have it decided that his foreclosure suit barred the present one; but since the present cause of action has nothing to do with the cause of action in that suit, the plea seems to be absurd.

The lower Court held that the plaintiffs were entitled to sell the tenure in execution of their second decree, because a Court had held that the former sale conveyed nothing, inasmuch as the defaulting tenant's interest had been previously mortgaged to the appellant. This however seems to me to be a wrong view. The Court which held the first sale to have no force as against the mortgagee, could not hold that the purchasers had acquired no interest, for clearly they acquired the debtor's equity of redemption, the year of grace having only just commenced when the purchase was made. The Court could only hold that the purchasers of the defaulter's interest took the tenure subject to the mortgagee's lien and could not hold it, if they failed to liquidate the debt within the year of grace. But it is now a settled point that the sale of a tenant's right and interest in a tenure does not bar the superior landlord from selling the tenure itself, in whosesoever's hands it may be, in execution of a decree for rent against the former holder. Any new comer into the tenure holds it subject to the landlord's claim for existing arrears of rent,—See the Full Bench Decision reported at page 94, 21 W. R.,—*Sham Chand Kundu and others* vs. *Brojonath Pal Chowdhry and others*. The defendant, appellant, therefore, having become the plaintiffs' tenant by foreclosure of the former tenant's mortgage, became liable for the amount of the decree for rent outstanding. As a matter of law, therefore, I have no doubt that the plaintiffs were entitled to put the tenure up for sale, although the right, title and interest of the original debtor had already passed away from him. There are however some other facts which should receive consideration in deciding the case. As the plaintiffs were the holders of both the decrees, under which the sales took place, they were necessarily aware that the defaulter had long ceased to hold any interest in the tenure at the time of the second sale. They were also necessarily aware that they had themselves purchased the defaulter's right, title and interest at the first sale, and by virtue of that purchase, they were still in possession of the tenure when they got it sold in Cheyt 1282, although their title as under-tenants had been decreed to the defendant, appellant, by virtue of his mortgage in Pous of that year.

The circumstances altogether seem strongly to indicate that the plaintiffs object in effecting the second sale (of the tenure itself) was not so much to realize the amount of their decree as to get rid of the mortgagee, who had succeeded in getting a decree for possession of the tenure. I think therefore that the plaintiffs ought to have given the mortgagee, decree-holder

notice of their claim for rent under their old decree, and to have given to him an opportunity of satisfying it, and so saving the tenure from sale. It is said they were not bound to give him any notice as he had not registered his name in their serishta; but as they necessarily knew of the judicial transfer to him of the tenure, having themselves been defendants in his suit, and as the circumstances show that they used their old decree for the purpose of circumventing him, I think that the Court ought to protect him from any unfair advantage being taken of him. It should be satisfied that he had full notice of the attachment and sale-proclamation for the second sale, and that he still neglected to pay off the amount of the decree. The lower Court says, it believes, that the defendant, appellant, was quite aware of the proceedings. But it is not apparent why he should have been. No notice was given to him, and he was not yet in possession of the tenure. In his deposition he swears that he knew nothing of the attachment, and there is no evidence to contradict him. His neglect to take possession under his decree at an earlier period and to register his name, was imprudent; but under the circumstances above set forth, I do not think that his neglect absolved the plaintiffs from the duty of treating him openly and fairly.

I think, therefore, that the Court should allow him an opportunity of paying up the amount of the decree, under which the tenure was sold, before allowing the plaintiffs to take the benefit of that sale. I therefore modify the decision of the lower Court, and decree that should the defendant, appellant, within one month pay up the amount of the decree, under which the tenure was sold in 1282, with interest to the date of sale and costs of the execution, his possession shall not be disturbed. Should he fail to do so, the lower Court's decree will be enforced. Each to pay his own costs of appeal.

The plaintiffs appealed.

Baboo *Unnoda Prosad Banerji*, and Baboo *Bhobani Churn Dutt*, for Appellants.

Baboo *Rash Behari Ghose*, and Baboo *Pran Kishen Biswas*, for Respondent.

The judgment of the Court(1) was delivered by

GARTH, *C.J.*:—

GARTH, *C.J.*

The facts of this case are very clearly stated in the judgment of the Court below. The suit is brought to recover possession of an under-tenure, of which the plaintiffs are the zemindars, and the registered tenant is one Khettro Mohun. The defendant No. 2 was the mortgagee of the tenure from Khettro Mohun.

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The rent of the tenure not being paid, the plaintiffs obtained two decrees against Khettro Mohun, one for the rent of the year 1278, and the other for the rent of 1279. Under the first decree the plaintiffs sold the right, title and interest of Khettro Mohun, subject to the mortgage, and obtained possession accordingly. Meanwhile, the mortgage money not being paid, the mortgagee gave notice of foreclosure, and afterwards brought a suit and obtained a decree for foreclosure.

The mortgagee, however, did not pay the amount of the second decree, and consequently the plaintiffs, under that decree, put up the tenure itself for sale under Act VIII of 1869, and purchased it themselves. By virtue of that purchase they sought to obtain possession of it on the 28th of Joisto 1282; but were resisted by the defendant Gonesh, who had in the meantime obtained possession of it under his foreclosure decree, and his claim was allowed against the plaintiff under section 269 of Act VIII of 1859.

The plaintiffs then brought this suit to recover possession from the defendant Gonesh, and the Court of First Instance gave them a decree.

The District Judge agreed generally with the Court below as to the facts, and apparently considered that the plaintiffs were justified in selling the tenure under their second decree. But he held that in equity the plaintiffs, before they exercised their right of sale, were bound to give direct notice of the decree to the mortgagee, (the defendant Gonesh,) and to inform him that they meant to sell it, and as they had not given that notice, the Judge allowed the defendant a month's time to pay the amount of the decree for rent, and adjudged, that if that amount were paid within the month, the plaintiffs' suit should be dismissed. Each party paying his own costs of the appeal.

The plaintiffs now appeal from this decision upon the ground that they had by law a right to sell the tenure under the second decree, and that they were not bound under the circumstances to give any notice of the decree to the defendant Gonesh.

The respondent on the other hand contends—

First.—That under the second sale made by the plaintiffs, the tenure itself did not pass, but only the right, title and interest

which the original tenant Khettro Mohun had in it, which was virtually nothing; and in support of this contention, we certainly do find that the certificate under the second sale only professed to pass the right, title and interest of the tenant in the tenure. It is clear, however, that in the Court of First Instance this point was not insisted on. The Subordinate Judge says, that on reference to the Decreejari case, it appears that the tenure itself was attached and sold, and he adds that the defendant's pleaders would not contest the point. Upon this ground the District Judge declined to entertain it, and we think that he was quite right.

Secondly.—In the next place, it has been strongly urged upon us, on the part of the respondent, that the plaintiffs were bound in equity to have given him notice of their decree, and that the Judge's decision founded on that obligation was correct; but we are quite unable to discover how such an obligation arises. There is certainly no provision to that effect in the Rent Law, and no authority has been referred to by the learned pleader for the respondent, which in any way justifies his contention.

It is remarkable that in the defendant's written statement he never says from first to last that he was not aware of the plaintiff's second decree, and the Moonsiff says that he does not believe he was ignorant of it. It certainly is very extraordinary if he was so; because the decree under which the sale took place was obtained so long ago as the year 1872, and the defendant since that time has been constantly engaged in litigation with reference to the tenure, and had every possible opportunity of ascertaining all particulars respecting it. But whether he knew of the decree or not it is quite clear that if he had done his duty to the plaintiffs, he would have ascertained the existence of the decree, and might, by paying the amount of it, have protected the tenure from sale. He obtained his decree in the foreclosure so long ago as December 1874, and as soon as he had then perfected his title he was bound by section 26 of the Rent Law, (Act VIII of 1869) to register his name in the plaintiff's sherista. If he had done his duty in this respect, and applied for registration, he would of course have been informed of the decree, and might have paid the amount of it. The law ought not to

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assist persons who place themselves in a difficulty by their own breach of duty, and we see no reason whatever why in this case the plaintiffs should have been bound to inform the defendant of that, which, if he had complied with the requirements of the law, he would have discovered for himself.

It is clear that if the defendant had purchased Khettro Mohun's interest, he could have been in no better position than Khettro Mohun, and would have been bound to find out for himself what Khettro Mohun's obligations were, and the defendant is virtually a purchaser from Khettro Mohun. He advanced his money upon security of the tenure upon terms, which, if the money was not repaid, enabled him to make the tenure his own, and he has availed himself of those terms. But he was bound of course to fulfil the requirements of his tenancy and the obligations of the person under whom he claimed. If he had done this, he would not have been a sufferer.

We were referred by the respondent's pleader to a case of *Nobin Kishen Mookerjee* vs. *Shib Pershad Pattuck*, 8 W. R., 96, for the purpose of showing that the zemindar is bound to recognize the title of a transferee of a transferable tenure, although he has not been registered. There is nothing in that case, however, which shows that the zemindar may not sell the tenure under a decree for rent as against such a transferee, and in point of fact that case does not in any way affect our present decision. If it did, I confess, speaking for myself, that I entertain grave doubts as to the correctness of that decision; and I should much wish to have it reconsidered.

The appeal is decreed, the judgment of the lower Appellate Court will be reversed, and that of the Subordinate Judge restored, with costs in this Court and in the Court below.

[CIVIL APPELLATE JURISDICTION.]

TARO BEBEE . . . . . DEFENDANT;

AND

GHASIRAM. . . . . PLAINTIFF.

1878
July 22nd.

No. 222
of 1876.

Gift not followed by possession—Loco parentis—Hindoo Law—Absolute Gift—Immediate Gift.

A Hindoo merchant made an absolute and immediate gift of all his property to the widow of his daughter's grandson who lived with him, and in regard to whom he stood in *loco parentis*. It did not appear that the gift had been followed by possession, and the donor continued to carry on the business in his own name, until his death, which happened some two years afterwards. *Held*, that the gift was valid.

Anunchund Rai vs. *Kishen Mohun Bunoja*, 1 Select Reports, p. 152, cited and followed.

REGULAR APPEAL from a decree passed by the Subordinate Judge of Patna.

This was a suit to recover possession of the property and fects of Baboo Ajoodhya Pershad, mahajun, a resident of Patna. he plaintiff claimed as the nearest heir of the deceased, and e defendant, under a registered *hibbanama* dated the 14th of nuary 1873, executed in her favour by the deceased who was e great grandfather of her husband. It appeared that Ajoodhya rshad had only one daughter named Purun Bebee, who had a ghter named Golabi. Golabi had two sons, Gobordhun and darnath. Gobordhun was not on good terms with Ajoodhya rshad, and for many years previous to the death of the latter not lived in Patna, but the younger brother Kedarnath lived the house of Ajoodhya Pershad after his marriage with Taro bee in 1866, and, it seems, died there. After his death Taro bee continued to live with Ajoodhya Pershad till his death on 23rd of May 1875, and was the only relative near him. On 14th of January 1873, Ajoodhya Pershad made a gift of all property to Taro Bebee; and, as she alleged, put her into ssion of it, but he continued to carry on the business in wn name until his death in 1875.

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The Subordinate Judge found that the deed of gift was genu and was executed by Ajoodhya while in a state of sound mi that the property was the self-acquired property of Ajood Pershad; but that Mussamut Taro Bebee had not obta possession of the property by virtue of the deed of gift. decreed the plaintiff's claim on the ground that the gift wa imperfect one, citing Norton's Leading Cases, 312; Tagore Lectures, 1871, pp. 35, 36, 38; and distinguishing 6 W. 245—*Maharajah Buksh Singh* vs. *Gunoon Koonwur.*

The defendant had also contended that the gift was good ur section 25 of the Indian Contract Act, IX of 1872, but contention was overruled. The defendant appealed.

Evans, for the Appellant. Baboo *Mohesh Chunder Chowd* and Baboo *Srish Chunder Chowdhry* with him.

Mr. *C. Gregory*, Baboo *Kally Mohun Doss*, and Baboo *Ama dro Nath Chatterjee*, for the Respondent.

The following judgments were delivered by the F Court (1):—

AINSLIE, *J.*

AINSLIE, *J.*:—

One Ajoodhya Pershad died on the 23rd of May 1875. plaintiff in the present suit claims as next-of-kin. The def ant sets up a deed of gift of the 14th of January 1873, exec by the deceased. The Subordinate Judge who tried the found as a fact that Ajoodhya Pershad did execute the deed forward by the defendant, but he was of opinion that there been no actual transfer of possession, and that consequently gift unaccompanied by delivery of possession was inopera He, therefore, made a decree in favour of the plaintiff.

The defendant has appealed against that decree, and the p tiff has also filed a cross-appeal objecting to the finding o Subordinate Judge as to the execution of the deed of gift also that the properties claimed by him were ancestral an the self-acquired properties of Ajoodhya Pershad. This l point was, however, not pressed, and could not be so in the

(1) AINSLIE and BROUGHTON, *J.J.*

of the evidence which is on the record. There is next to no evidence on the subject, but such as there is goes to show that the properties were exclusively acquired by Ajoodhya Pershad. In fact one of the plaintiff's witnesses, Gopal Misser, who was examined on commission, states that they were so acquired.

There is evidence of several witnesses, apparently persons of respectability, who speak distinctly and positively of the execution of the deed of gift by Ajoodhya Pershad. There is also evidence to show that Ajoodhya Pershad, in his lifetime, caused a mooktearnamah to be produced before the Registrar of Deeds, and that that officer attended at his house for the purpose of ascertaining the genuineness of that mooktearnamah. Without charging the whole of the witnesses with wholesale perjury, and the witness Gajadhur Lall with having caused Ajoodhya Pershad to be falsely personated before the Registrar of Deeds, it is impossible to hold that this deed was not really executed by Ajoodhya Pershad. We are, therefore, bound to come to the same conclusion as the Subordinate Judge has arrived at, that as a matter of fact Ajoodhya Pershad executed the deed of gift and caused it to be registered.

The question then is, whether Ajoodhya Pershad intended this gift to operate, or whether the document was merely prepared and kept by him for some purpose which he never carried into effect? In determining this question we must look to the position of the parties. Ajoodhya Pershad himself appears to have had only one daughter, whose daughter was the mother of two sons, Gobordhun and Kedarnath. Taro Bebee, the defendant in the present case, is the widow of one of those great-grandsons, Kedarnath.

The witness whose evidence I have before alluded to says, that Ajoodhya Pershad was not particular in recognizing the duty of performing ceremonies for his ancestors. It may very well be therefore that he should have thought fit to leave the whole of his property to his daughter's daughter's sons; and that, in order to prevent litigation, he should have made arrangements to dispose of it during his lifetime. There is some evidence to show that the elder of the great-grandsons displeased the old man and left him. The younger died, we do not know exactly when; but

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from the time of his death Taro Bebee, his widow, appea have been the only person left of the family, and residing and taking care of her husband's great-grandfather. U these circumstances, it is by no means improbable that Ajoo Pershad should have contemplated making a gift in his life to Taro Bebee in order to protect her against any claim might be put forward after his death by other members of family.

The defendant has given some evidence to show that there an actual transfer of property (which in the main consisted banking business) by Ajoodhya in his lifetime. This evid is, however, open to a good deal of comment, and, in my opin ought not to be relied upon; but the fact that the defendant attempted to prove something more than the truth, and usually happens in such cases, has given the other side the ad tage of being able to comment strongly on the character of evidence of actual transfer, is not to be taken by itself as pro that the case supported by such evidence is false. There is o evidence in the case, principally the evidence of the conduc Ajoodhya himself, which is of great weight. We find not that he took the most public means of declaring his intentio making a gift to Taro Bebee by registering this document, that there is evidence, some of it derived from witnesses ca by the plaintiff, to show that the gift was a notorious fact in lifetime; and one of the witnesses states, that he was infor of the circumstance by Ajoodhya himself. It is not at all u tural that he should, up to the time of his death, have conti to manage the banking business, and that he should have ried it on in his own name, although it was his intention Taro Bebee should have the profits of it.

There are several cases which show that where the don guardian of the donee, the Courts will presume that contin possession of the subject of gift by the former is really fo benefit of and in trust for the latter. A case cited fro Select Reports, p. 115 (152)—*Anundchand Rai* vs. *Kishen M Bunoja*, shows clearly that, as far back as 1805, it was held although a father had been proved to have been dealing as o with property of which he purported to have made a gift, y

must be taken that he was holding it all the time for the benefit of his minor son. Therefore, although it is clear on the evidence that Ajoodhya Pershad continued up to his death to manage the banking business, yet, as there is nothing to show that he was not doing it for his great grandson's widow, it is a fair presumption that he was acting on her behalf. There is very clear evidence of the intention on his part to make over the property to her, and there is not a trace of evidence of intention of any kind before his death to revoke the gift, although upwards of two years elapsed between the date of the deed and his death.

It seems to me, therefore, that the finding of the Subordinate Judge, that there was no actual transfer of possession, ought to be set aside, and that we ought to hold that Ajoodhya Pershad was in fact holding from the date of the deed of gift up to the date of his death as trustee for Taro Bebee.

Under these circumstances the question, whether a gift unaccompanied by delivery of possession is operative or not, does not arise, and it is unnecessary to discuss the cases cited on behalf of the respondent on that point. The decision of the lower Court will be set aside and the suit dismissed with costs.

BROUGHTON, J.:—

BROUGHTON, J.

I am entirely of the same opinion. The position of the parties was such that it seems to me that the old man Ajoodhya Pershad was bound to make some provision for the defendant Taro Bebee, who lived with him during his old age, and who, if he did not make a provision for her, would have been left entirely destitute. It was the most natural thing in the world for Ajoodhya Pershad to provide for her.

Of his two great grandsons, Kedarnath died, and Gobordhun for some reason or other left him. In the same way his cousin Ghasiram kept away from him. The only person who remained actually living with the old man, was the widow of Kedarnath, Taro Bebee. So that there was ample motive for the gift, and it seems to me that Ajoodhya Pershad would have behaved excessively harshly towards her if he had left her destitute. Having lived in affluence with him, he knew that unless he made provision for her she would have been left in utter want and

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unprotected in the world, and therefore he made an arrangeme which would obviate that. There is no doubt that he did execu the deed. There is ample evidence to show that; and he regi tered it, and took the greatest trouble to make it public. T fact of its having been made was known shortly after its execu tion to the plaintiff himself.

If the transaction is to be avoided, it must be on very strong grounds. It is said that it falls to the ground because Taro Bebee did not take possession of the property. Several cases have been cited in support of this contention, and several texts of Hindoo law, which go to show that a donor cannot resume a gift after the donee has taken possession; that possession must be shown, in order to make a gift valid as against creditors; and also that a gift is itself imperfect until possession of some sort has been taken by the donee. The evidence of the possession and the nature of the possession necessary to support the gift must vary in different cases, and I think that in a case like this, where the gift has not been secret or merely verbal, but open and by a formal deed, very slight evidence of possession suffices to support it, for possession is only evidence of the gift; and it seems to me that the case reported in the Select Reports, referred to by Mr. Justice AINSLIE, shows that the possession of a person like Ajoodhya Pershad, who was in *loco parentis* as regards Tar Bebee, his donee, was sufficient possession, coupled with the notoriety of the fact of the gift and the registration of the deed, t make the gift perfect.

Therefore I agree that the decision of the lower Court shoul be set aside, and the suit dismissed with all costs.

[CIVIL APPELLATE JURISDICTION.]

THOMAS M. PIGOU . . . . . PLAINTIFF;

AND

SYED MOHAMED ABOO SYED, AND OTHERS . DEFENDANTS.

1878 *July 24th.*

No. 205 of 1876.

Res-judicata—*Suit for possession—Setting aside sale—Irregularity—Void sale.*

When a plaintiff sues for possession and determination of right to a certain property, and to set aside an execution sale of a portion of the property on the ground of irregularity, and his suit is dismissed on the merits, a subsequent suit for possession of the property sold, on the ground that the sale was void *ab initio*, will be barred as *res-judicata.*

Wooma Tara Dehia vs. *Unnopoorna Dassee*, 11 B. L. R., 158; and *Taver* vs. *Katama Natchiar*, 11 Moore's Ind. App., 50, cited and followed.

REGULAR APPEAL from a decree passed by the Officiating Judge of Patna.

Phillips, for the Appellant. Baboo *Rajendro Nath Bose*, with him.

Mr. *R. E. Twidale*, and Mr. *C. Gregory*, for the Respondent.

The judgment of the High Court (1) was delivered by

BROUGHTON, *J.*:—

BROUGHTON, *J.*

It is not necessary to call upon the respondent in this case. Before I say anything with reference to the case itself, I wish to remark on the way in which the paper-book has been prepared. The case is a somewhat long and complicated one, and the materials have been put together in such a way that it is not difficult to make out where to look for particular documents. There seems to be no order or arrangement at all. The paper-book has cost no doubt a great deal of money, and a good deal of our

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time has been spent by counsel in looking through it in order to ascertain and point out what we have got to decide upon. A great deal of their money and a great deal of the learned counsel's time and our own would have been saved had the paper-book been prepared with only common care.

The case arises out of some execution proceedings which followed certain very old suits. They were three in number, and the proceedings in execution are numbered 219 of 1862, 141 of 1863, and 62 of 1863. The sum that was due under the decree in the first suit appears to have been Rs. 4,439 odd annas; in the second, Rs. 1,385 odd annas; and in the third, Rs. 5,236. In those execution proceedings certain sale notifications were issued in the year 1863, and certain applications were made by Mr. Pigou against whose property those execution proceedings were directed, in order that he might be enabled to stay execution and find security. The property which was directed to be sold in each of the three suits was, so far as it is material now, identical. He did succeed in obtaining a stay of proceedings in two of the suits, but execution in the third suit went on, and an order was made on the 10th of June 1863 to be found at page 32 of the paper-book directing the property to be sold.

It is pointed out by Mr. Phillips that that order refers in fact to all three suits. The order is in these words: "Let it be known to you that, besides the suit No. 219 of 1862, valued at Rs. 4,439-12-2-18, wherein Syed Nazir Ali, mooktear for Mussamut Humeden, is decree-holder, and also the suit No. 141 of 1863, valued at Rs. 1,441-0-9, wherein Narain Dass is decree-holder, are pending decision in this Court." But Mr. Phillips also pointed out that nothing is said there as to the execution of the decrees in the two first suits, namely, Nos. 219 and 141.

The only order made on the 10th of June 1863 was that the decree in the case No. 62 of 1863 should be executed. The orders for sale in execution in the other suits had been made some time before, and notifications had been issued, and the days fixed for sale in these suits; those days were prior to the 10th June 1863, but the proceedings alluded to had operated as a stay of those sales.

Mr. Phillips, on behalf of Mr. Pigou, the surety in the first case and the judgment-debtor in the other two, objects to those sales, and says that they took place irregularly, because they were sales under all three decrees, whereas the order for sale was only in respect of one decree, and he urges that they are a nullity; and, that if they are not a nullity, the whole transaction was fraudulent.

Dealing with the last point first, it seems to me that there is not the slightest evidence of fraud. The plaintiff has come forward and made a most reckless allegation, charging an officer of Court and the defendants in this suit with fraud, but that allegation is entirely unsupported by any evidence.

Then the question arises whether the sale is a nullity. It is objected by the respondent that the case cannot go on owing to the fact that similar proceedings have been already taken in another suit of an exactly similar character, and that the point raised now was decided then. The judgment in the former suit is printed at page 52 of the paper-book, and it is said there that "in this suit the plaintiff seeks for possession and for determination of his right to four bighas of land which was not sold, a two-storeyed house with appurtenances which were sold, two bighas of land which were not sold, and a bungalow which were sold in execution of decrees, all properties being in the city of Patna. The declaration further seeks for cancellation of the sale in question, which took place on the 13th June 1863," that is to say in pursuance of the order of the 10th of June 1863, to which I have already alluded.

The properties with which that suit had to do include the properties involved in this suit. But it is said by Mr. Phillips that the two suits are not identical, because in the former suit the plaintiff sought to set aside the sales for irregularity, and on this occasion he sues to recover property on the ground that the sales were void *ab initio*.

The question is not whether the two suits were in point of fact the same, or whether the form of asking for relief was the same; but whether the same substantial question was adjudicated upon, and the same substantial relief was asked for.

There has been a very recent decision of the Judicial Committee of the Privy Council on the subject, (*res-judicata*,) passed

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[illegible]

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in the year 1872—*Wasna Tara Dabee* vs. *Unnopoorna Dasee*, 2 Bengal L. R. A. C. 102, in the Original Court, and 11 B. L. R., 156, in the Privy Council. The facts in that case were, that the plaintiff claimed the land in her first suit as *taufir*, but failing to recover in that suit she brought a fresh one for the recovery of the land as part of her talook. The Judicial Committee declined to allow her to do this, and referred to the principle which had been laid down by Lord WESTBURY in the case of *Katama Natchiar* (11 Moore's Indian Appeals, page 50). Their Lordships say: "In that case a party had brought a suit claiming under a will, having, as defendant in a former suit, abandoned his title under that will, admitting that the will did not amount to a devise, and resting his title upon the issue whether the estate was separate or undivided, and Lord WESTBURY said: That being the state of the case, we are now called upon to approve of a suit subsequently instituted by the very person who had deliberately given this character to the instrument—a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid will and testament. It is impossible that any such suit should be allowed to proceed. In the first place it is clear upon the former record that the appellant had then the power of relying upon that document as being a valid will. He in effect stated, or might have stated, his defence in the suit of 1856 in the alternative. He might first have insisted that it was an undivided property, and that therefore the plaintiffs in those suits had no interest therein; and, secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour. When a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward." In the same way when a plaintiff makes a claim he is bound to bring forward everything which, according to his knowledge, he can bring forward.

In the present case, the plaintiff originally sued to set aside these sales as irregular, and failing in that he brings the present

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THOMAS M. PIGOU v. SYED MOHAMED ABOO SYED.

Judgment.

BROUGHTON, J.

; on the ground that the sales are a nullity, because the order cting them was issued in the name of the Clerk of the Court ead of in that of the Judge. He says he did not ascertain ; until the year 1871, that is, after the decision of the other . It is impossible to take that statement as true, because hese proceedings public notifications are given, and the record lf shows, and he himself states in his evidence, that he was stantly about the Court, and therefore must have known how e things were done; and the slightest diligence on his part ld have enabled him to ascertain that these documents were ed by the Clerk as he says they were. He was bound to put ard his case in its fullest bearing, and also to exercise due gence.

t appears to me, therefore, that the decision of the Privy ncil in the case of *Wooma Tara Dabia* vs. *Unnopoorna Dassee*, Bengal Law Reports, page 158, and the principle laid down Lord WESTBURY in the case in 11 Moore's Indian Appeals, e 50, are strictly applicable to this case; and that on the und of *res-judicata* the plaintiff's suit must fail. I think, refore, that this appeal ought to be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

1878. *July 25th.*

No. 1514 of 1877.

RAJA KUMUD NARAIN BHUP . . . . PLAINTIFF;

AND

PURNO CHUNDER ROY CHOWDHRY . DEFENDANT.

Jurisdiction—Civil Courts—Revenue Courts—Zemindar—Agent—Dewan—Act X of 1859, *section* 24.

In a district where Act X of 1859 is still in force, a suit against dewan for the recovery of money alleged to have been misappropriated and a large portion of which was received by the dewan not in the course of his employment, is cognizable by the Civil Courts.

SPECIAL APPEAL from the decree of the Judge of the Assam Valley, affirming that of the Deputy Commissioner of Goalpara.

Baboo *Hem Chunder Banerjee*, for Appellant.
Baboo *Aubinash Chunder Banerjee*, for Respondent.

The facts of the case are sufficiently set forth in the judgment of the Court (1) which was delivered by

JACKSON, *J.*

JACKSON, *J.*:—

The plaintiff, who is the Rajah of Bijni, a place in Assam, sued the defendant, who held the post of dewan in his service, to recover Rs. 4,714-5-1, misappropriated and spent improperly and unnecessarily on the strength of an illegal and fraudulent contract: and in the particulars of the case it was stated that the plaintiff, on attaining the age of majority, took charge of his property and appointed the defendant to the post of dewan; that on arrival at Goalundo, he advanced from his own hand Rs. 1,000 to the defendant, and sent him to Goalpara; that after that the defendant, in the course of his employment, retained certain special officers already in employment, appointed others who were his own relatives and defendants, on extravagant rates of pay, and made out a bill for their salaries for the time

(1) JACKSON and TOTTENHAM, *J.J.*

in December 1874, under a false allegation of having engaged them; that he had unjustly debited the plaintiff with that and other sums of money; that he had also ijarah pottahs to be written out, and finally had absconded, taking away with him Rs. 794-2-7, being the amount of the cash then in his hands.

He further charges that, besides doing this, the defendant obtained a sum of money intended, as I understand, for payment to the Oriental Bank, and appropriated it, together with the cash in hand, to himself, and by debiting a part of it to the salaries of himself and some other servants, and the remainder to the sum alleged to be due to him under a stipulation which he fraudulently inserted at the foot of the letter of appointment, setting out that in the event of his being dismissed he should get Rs. 500 for five years. The plaintiff, therefore, sued to recover all this money as per account.

The first plea set up in defence by the naib was, that Act X of 1859 being still in force in Assam, and the defendant being in charge of the collections from the plaintiff's estate, he was liable to be sued under section 24 of that Act, and not otherwise. This plea appears to have been accepted by the Deputy Commissioner, who says: "I have gone over the account filed by the plaintiff, and find that the sums alleged to have been misused were received by the defendant as rents of the plaintiff's estate, he being at the time the plaintiff's duly constituted land agent, or dewan, and authorized to receive revenue collections of the plaintiff's estate. He says, the suit is brought for recovery of a portion of the money so received by the defendant, on the ground that the expenditure incurred by him under certain heads were wasteful, extravagant and improper. I do not think that the manner in which the defendant may have misappropriated the money can give this Court jurisdiction in a matter which, under section 24, Act X of 1859, is cognizable only by a Revenue Court."

On appeal, the Judge of the Assam Valley Districts observes:—"There is no doubt whatever that this is a case coming under section 24, Act X of 1859, which is still in force in Assam, and therefore not cognizable in the Civil Courts. The dewan admitted by the appellant's pleader to have been employed

[illegible]

[illegible] armer, or [illegible]

[illegible] person entitled to receive [illegible]

[illegible] the collectors of land [illegible]

[illegible] under the provisions of this [illegible]

[illegible] notwithstanding that, any suit [illegible]

[illegible] other person besides the person ent[illegible]

[illegible] same, was always held to be cognizable [illegible]

[illegible] the Revenue Courts. Therefore, w[illegible]

[illegible] includes moneys received by the defend[illegible]

[illegible] received directly from the hands of his [illegible]

[illegible] doubt that the suit does not come wit[illegible]

[illegible] section 24. Nor is the defendant a person [illegible] in the management of land or collecti[illegible]

[illegible] was admitted, no doubt, to have been emplo[illegible]

[illegible] making settlements and doing other dutie[illegible]

these duties very likely were part, and perhaps an importa[illegible]

of the duties which he had to perform. But the dewa[illegible]

large landlord, such as the Rajah of Bijni, has many other [illegible]

to perform; and, if he performs duties of the kind men[illegible]

he does so in the way of general superintendence.

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Judgment.

JACKSON, J.

The allegation in this case was clear that the plaintiff had advanced Rs. 1,000 to the defendant. That clearly was not collections. It was money which had got into the hands of the master, and was by him entrusted to the defendant to be disbursed to his servants. In like manner, the money in the Oriental Bank, whatever its origin may have been, was so much cash at the disposal of the master. Clearly, therefore, this was a suit of which certainly the whole, and possibly not any part, was cognizable by the Revenue Court. It appears quite clear that it was properly brought in the Civil Court, and improperly dismissed for want of jurisdiction.

The judgments of the Courts below must be set aside, and the suit must be tried upon its merits. We think that the appellant should have his costs.

[CIVIL APPELLATE JURISDICTION.]

GOLAMI SAHU . . . . . DECREE-HOLDER;

AND

CHUTTERBHOOJ PATUCK AND OTHERS JUDGMENT-DEBTORS.

July 31st.

No. 84 of 1878.

Limitation—Execution of Decree—Application for execution—Attachment kept in force.

A decree-holder applied for execution on the 10th of October 1871. On the 24th of February 1872, he made an application to the Court executing the decree, that the case should be taken off the file for the present, but that the attachment which had been issued should be kept in force. The application was granted, but the formal order, as drawn up, though it recited the application, was merely to take the case off the file. On the 6th of February 1875, the decree-holder applied for further execution. It was objected that execution of the decree was barred by limitation, but it was held that limitation did not apply, as the petition was for the continuance of the suspended proceedings and not for fresh execution.

SPECIAL APPEAL from a decree passed by the Additional Judge of Gya, affirming that of the first Moonsiff of that district, which dismissed the special appellant's application for execution of a decree.

Baboo *Jogesh Chunder Dey*, for Appellant.

Baboo *Jodoo Nath Sahai* for Respondent.

[illegible] the judgment [illegible]

[illegible] decree [illegible] the 14th of Fe[illegible] the Court the [illegible] Sawun 1279, [illegible] He the [illegible] for the p[illegible] should be [illegible] petition t[illegible] the c[illegible] appears t[illegible] Althou[illegible] the actual o[illegible] we think that it is [illegible] the petitio[illegible] of the Cou[illegible] further pr[illegible] expired. The actua[illegible] *sine die*, keepi[illegible]

The [illegible] and inconvenient form [illegible] judgment-debtor to have [illegible] Sawun 1279, and asked for a formal taking [illegible] He did not do this, and the [illegible] no steps until the 6th of [illegible]ruary 1875, [illegible] forward with a new petition.

It is contended that that petition is one under section [illegible] Act VIII of 1859, and is in form drawn up containing the [illegible]culars required by that section: but the prayer of the judg[illegible] creditor is not to have altogether new proceedings taken, [illegible]mencing with a fresh attachment, but to go on upon th[illegible] attachment and to resume proceedings by issuing a no[illegible] sale.

(1) AINSLIE and BROUGHTON, J.J.

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GOLAMI SAHU v. CHUTTER-BHOOJ PATUCK.

Judgment.

AINSLIE, *J.*

Looking at the fact that it was not the intention of the Court in February 1872 to take off the attachment, that the attachment was never afterwards taken off by any formal order, and that the decree-holder sought to go on upon that attachment, we think that it must be taken that the application of the 6th of February 1875 was really an application to receive suspended proceedings, and was not a new application to which the law of limitation applies.

The order of the lower Court must therefore be set aside, and the case sent back to allow execution to be sued out as on the application of the 10th October 1871. The appeal is allowed with costs.

[CRIMINAL REFERENCE.]

July 3rd.

No. 938 of 1878.

HEN CHUNDER KURMOKAR . . . COMPLAINANT;

AND

URRY DOYAL KURMOKAR . . . . DEFENDANT.

rpretation—Session Cases—Act X of 1872, section 296—Discharge of Accused—Witness—Examination of Witness—Revival of Proceedings.

In section 296 of the Code of Criminal Procedure, "Session Cases" mean cases exclusively triable by a Court of Session.

Where the Deputy Magistrate discharges an accused person without having examined the principal witness in the case, his order is bad, and the District Magistrate is competent to revive the proceedings.

Empress vs. *Donelly*, I. L. R., 2 Cal., 405, cited and followed.

IMINAL REFERENCE from the Sessions Judge of Dacca. order of reference is as follows:—

his case was originally tried by Moulvie Abdool Guffoor, the ty Magistrate of Dacca, who discharged the defendant unsection 195 of the Criminal Procedure Code. The case brought by the complainant to the notice of the District strate, who called up and examined the complainant's r, whom the Deputy Magistrate had not examined, appa- because she was reported not overstrong in the head.

think that in this case the Magistrate's order is contrary law as at present settled. The offence for which the

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prisoner was tried was theft under section 380 of the I Penal Code, and this not being exclusively triable by the (of Session, the Magistrate had not the power to commi feel bound, therefore, to lay the proceeding before the Court in order that the proceeding may be quashed."

The judgment of the High Court (1) on the reference mitted is as follows :—

The Deputy Magistrate, Moulvie Abdool Guffoor, discha the accused, but on the application of the complainant District Magistrate has committed him to the Court of Ses notwithstanding that objection to his jurisdiction was ra The Magistrate appears to have considered that he had ju diction, because, this being a case regarding an offence tri by the Court of Session as well as by a Magistrate, he c act under section 296 of the Code of Criminal Procedure. Sessions Judge has referred the case to have this commitn set aside as illegal.

The grounds on which the Magistrate held that he c re-open this case are bad, as it has been held that the t "Session case" in section 296 means a case triable exclusi by the Court of Session. But we think that the commitn should be maintained on another ground.

The Deputy Magistrate discharged the accused without mining the principal witness in the case, the woman who alone present in the house when it was robbed, because, as Sessions Judge expresses it, "she was reported not over str in the head." The Deputy Magistrate's order was, theref bad, and under the rule laid down in the case of *Empress Donelly*, I. L. R., 2 Calcutta 405, (see page 412,) the Dist Magistrate was competent to revive the proceedings, fur evidence being available. We, therefore, decline to interfere.

(1) Markby and Prinsep, *J.J.*

[PRIVY COUNCIL.]

1878
July 2nd.

AMA RAO . . . . . PLAINTIFF;

AND

URIYA RAO . . . . . DEFENDANT.

res judicata—*Hindu Widow—Deed of gift—Parties to Suit—Cause of Action.*

In 1862, plaintiff brought a suit against a Hindu widow and other defendants, in which he stated that certain properties, X, Y and Z, belonging to him, had been given to the widow for her life, for maintenance; and that she had alienated X and Y to the other defendants. The plaintiff prayed that the deed of gift might be delivered up to be cancelled; that possession of X might be given to him; and that any alienation of Y might be restrained. No further mention was made of Z; no relief was asked respecting it, nor any assertion made that the widow had improperly dealt with it, or that the defendants were in any way connected with it, and the suit was dismissed as regards Z. After the widow's death plaintiff again sued, for possession of Z, parties who claimed under the defendants in the previous suit against the widow.

Held, reversing the decision of the High Court of Judicature at Madras, that the second suit was not barred as on a cause of action which was *res adjudicata*.

PPEAL from a decision passed by the High Court of Judica- at Madras, which will be found reported in the Indian Law orts, Madras Series, Volume I, page 84. The facts of the are sufficiently set forth there, and in the following judgment eir Lordships of the Privy Council (1) :—

is is an appeal in a suit brought by the plaintiff to recover ssion of certain houses and grounds appertaining thereto, e in the Fort of Pettapuram, which he claimed as part of emindari of Pettapuram. He stated in his plaint that his r, "Sri Raja Row (late) Venkata Surya Row, Bahadur, and defendant's father, Sri Rajah Row (late) Kumara Venkata Bahadur, were brothers, of whom the plaintiff's father, who elder, succeeded to the ancient zemindari of Pettapuram, ing to their father Sri Rajah (late) Niladri Row, Bahadur;

JAMES W. COLVILE, Sir BARNES PEACOCK, Sir ROBERT P. COLLIER.

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Judgment.

and after him the plaintiff became his successor." He furthe said: "As the plaintiff's paternal grandmother, Sri Raja Ro (late) Bhavayyamma Garu, was a member of the plaintiff's family she lived in some of the houses within the Fort of Pettapuran belonging to the plaintiff, and had in her use some ground appertaining to that fort; and, while so, she died on the 11th March 1870. The defendants retained the said houses and grounds in their possession even after her death, on the ground of their having occupied them with her until her death; and although the plaintiff demanded them to surrender him up to the plaintiff, in July 1870, they have not done so yet; and therefore the cause of action arose in that month."

The defendants, in their written statement, set up in defence that the claim was barred by the Statute of Limitations; and, further, they stated that they were entitled to the property in dispute, and that the plaintiff had no right to recover the same on the pretext that the property formed a part of his zemindari. In paragraph three they said: "The plaintiff brought the suit No. of 1862, on the file of the late Civil Court, against the defendant's father, and others, for a decree establishing his right to these house and other property; and the said suit having been dismissed, he ha now again brought this suit for the said houses; and this suit i therefore opposed to section 2 of the Code of Civil Procedure." Upon that an issue was raised, whether the plaintiff was barre under section 2 of the Civil Procedure Code from bringing th suit by reason of the cause of action, or any part thereof, havin been previously heard and determined by a Court of compete jurisdiction, in a former suit between the same parties, or parti under whom they claim.

The principal question in this appeal is, whether the rig to recover the property in suit was determined in a former sui and, whether, as regards that property, it was a suit between t same parties, or parties under whom they claim.

The former suit was brought in 1862 against the widow Niladri Row, the grandfather of the plaintiff, and also against t father of the defendants, and the sister of their father.

The grounds were: first, that the widow had misappropria certain movable property belonging to the estate of her dece

usband, Niladri, and had, with part of the proceeds thereof, urchased certain muttas described in No. 1 of the particulars nnexed to the plaint, and had alienated the same to the co-defendants by deed of gift; secondly, that the lands described in No. 2 of the said particulars were *sree* lands, to which she was entitled only for life by way of maintenance, but that she had executed a document transferring them to the co-defendants as a gift.

There was also another item in the particulars, No. 3, described as "an upstair house, situated within the fort of Petta-"puram, belonging to the plaintiff, and valued at Rs. 4,000, "together with three houses attached thereto, as well as a yard "and compound."

There is no doubt as to the fact that the property mentioned in No. 3 is the same property as that which is now sought to be recovered. As regards the properties described as Nos. 1 and 2, the plaintiff sought, amongst other things, to have the deeds of gift cancelled, to recover possession of No. 1, and for a prohibition against the alienation of property No. 2. As regards the property described in No. 3, and which was sought to be recovered in the present suit, there was no distinct allegation of fact either in the plaint or in the written statement, nor anything to connect the present defendant's father therewith, or to disclose any claim thereto, on the part of the plaintiff; and their Lordships have come to the conclusion, that substantially the relief sought in respect of it was, as stated by the High Court, to restrain the widow from acts of waste.

As regards Nos. 1 and 2, which are not the subject of the present suit, they had been assigned by the widow to the co-defendants, who, of course, were interested in them, and necessary parties to the suit; but as regards the houses and other property, the subject of the present suit, there was no charge that she had ever assigned, or that she intended to assign them, to the co-defendants, nor any allegation to show that the co-defendants had any interest whatever in them.

As regards that portion of the property, then, to which this relates, and as to which the High Court considered the form of suit was one to restrain waste, the widow was substantially

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Judgment.

the only defendant, and his co-defendants were no parties to t suit.

No issue was raised, nor any evidence offered on either side, respect of that part of the property, either to show that the plai tiff was entitled to an injunction or for any other purpose, and t plaintiff's suit was dismissed. The High Court, in appeal, affirm ed the judgment. They said: "The judgment must be affirme with respect to the houses and premises described as No. 3, ther being no evidence whatever relating to this head of claim." Unde these circumstances their Lordships are of opinion that the deci sion in the former suit was not a decision in a suit between th same parties, or parties under whom they claim, establishing th right of the defendants in the former suit to the property in que tion in the present suit, and that the cause of action in the present suit was not determined in the former suit.

The issue as to *res judicata*, however, was not the only issue i the present suit; other issues were raised. The first was: "Wh ther the houses and sites claimed appertain to the zemindari, an as such, are the property of the plaintiff, the zemindar, or are th property of the defendants." The Judge of the first Court did n determine that issue. He said: "I find in the affirmative on th 4th issue," (that is, the issue as to *res judicata*), "and with th evidence before me, under which I hold the plaintiff estopped fro bringing this suit, I could not but find, were it necessary to reco a finding, against the plaintiff on the first issue." As regards th estoppel, the same principle which applies to *res judicata* must ap to that; the parties were not bound by the estoppel, inasmuch the former suit was not substantially, as regards the houses a property in the present suit, a suit between the same parties, n was there in it a claim or a decision as to the right.

There was also another issue, namely, whether the suit is bar by limitation. As regards that issue, the Judge of the first Co says: "To sum up, I find that the grandmother of the defendan and her son, and afterwards her son's sons, lived together in t premises now sued for, as their principal place of residence, not o from 1835, as stated by the defendants,—from 1845, as stated by plaintiff,—but the grandmother and her son lived there from before the death of Niladri Row, in 1828, and continuously, w

but few breaks or visits at times." There is, however, no express finding as to the title under which the mother remained in possession. If the houses were part of the zemindari which descended to the plaintiff, it would be important to ascertain whether the mother remained in possession by reason of an agreement or other arrangement by which she was to be allowed to remain there for her life, as her place of residence, or whether she continued there as a trespasser holding the property as in her own right. There has been no finding upon that point, and therefore it will be necessary to have it determined. If she held in her own right or as a trespasser, then the Statute of Limitations would be a bar, but if she held under an arrangement by which she was allowed to remain there for her life, the occupation during her life would not be a bar to the present suit, inasmuch as she died within the period of limitation.

As regards the first and second issues, therefore, their Lordships think that under all the circumstances the case ought to be remanded to the High Court to determine them, and this more especially, as the respondents are not present to argue the case upon the evidence.

Under these circumstances, their Lordships will humbly advise Her Majesty that the finding upon the fourth issue be set aside, and the decree of the High Court be reversed, and that the case be remitted to the High Court to determine the first and second issues, and to decide the case upon the merits. The costs of this appeal will be taxed here, and are to be costs in the cause.

[FULL BENCH.]

1878.
July 15th

IN THE MATTER OF ASHUTOSH CHUCKERBUTTY AND OTHERS (*Convicts.*)

Confession of an accomplice—Accomplice—Evidence Act, section 30—Court—Jury—Joint trial—Corroborative Evidence.

Under section 30 of the Evidence Act, the confession of a prisoner, which affects himself and some other prisoner tried for the same offence at the same time, becomes, when duly proved, admissible in evidence as against both prisoners, and must be dealt with by the Court.

Where A and B are being jointly tried for the same offence, and the only evidence against B is the confession of A, B should be acquitted, as his conviction upon such evidence would be illegal.

The word "Court" in section 30 of the Evidence Act means the Court before which the trial of the prisoner is to be had, and in a Jury trial, means the Judge and Jury.

Per JACKSON, MARKBY, AINSLIE, and MCDONELL, *J.J.*—The corroborative evidence which, coupled with the confession of an alleged accomplice, would be sufficient to sustain the conviction of a prisoner, must be such as would itself, if believed, be sufficient for conviction.

Per GARTH, *C.J.*—How far any corroborative evidence would be sufficient, coupled with the confession of an accomplice, to convict a prisoner, must depend upon the circumstances of each particular case, and is a question for the Judge who tries it.

CRIMINAL REFERENCE to a Full Bench from Mr. Justice McDONELL and Mr. Justice BROUGHTON. The terms of the reference are as follows :—

The three prisoners have been convicted by the Additional Sessions Judge of 24-Pergunnahs of murder, and have been sentenced to death, and the proceedings have been sent up to this Court for confirmation of the sentence, under section 28[illegible] of the Criminal Procedure Code. The prisoners have likewise appealed.

With reference to the prisoners Baneswar and Akbar it was argued before us that the evidence on the record was not legally sufficient to convict them of the offence charged; that the so called confession and statement of Ashutosh was not legally

admissible as evidence against the other two; and that the Judge had erred in law and had misdirected the Jury when he put before them Ashutosh's confession and told them they might take into consideration as against the other two prisoners. Various rulings on section 30 of Act I of 1872 have been pointed out to us. (*R.* vs. *Malapa bin Kapana,* 11 Bom. H. C. R., 196; *R.* vs. *Mohesh Biswas,* 19 W. R., Crim., 16; *R.* vs. *Jaffir Ali,* 19 W. R., Crim., 57; *R.* vs. *Belat Ali Moonshee,* 19 W. R., Crim., 67; *R.* vs. *Sadu Mundul,* 21 W. R., Crim., 69; *R.* vs. *Naga,* 23 W. R., Crim. 24; *R.* vs. *Chunder Bhutacharjee,* 27 W. R., Crim., 42; *R.* vs. *Keshub Bhoonia,* 25 W. R., 8; *R.* vs. *Baijoo Chowdhree,* 25 W. R., Crim., 43; *R.* vs. *Narain Teli*—(MARKBY and MORRIS, *J.J.*), May 27th, 1875.) In these decisions it has been held that such confessions are of little weight unless they are corroborated by other testimony; that they have all the infirmity that attaches to the evidence of an accomplice; in fact that they are of less weight as they are not given on oath, and the party making them is not subject to cross-examination: it has further been held (*R.* vs. *Chunder Bhuttacharjee,* 24 W. R., Crim., 42,) that they cannot be used as the basis of a case, but merely as corroborative of other independent evidence.

In some of the decisions (*R.* vs. *Naga,* 23 W. R., Crim., 24; *R.* vs. *Chunder Bhuttacharjee,* 24 W. R., Crim., 42,) it has been pointed out that the Legislature have avoided calling the statement "evidence," and finally it has been held, in the case of *Narain Teli and others,* 27th May 1875, decided by MARKBY and MORRIS, *J.J.*, that the statement (in a case tried by a Jury) should not be put before the Jury; that the word "Court" in section 30 means only the Judge and not the Jury; and that, it being "evidence" as defined in section 3 of the Evidence Act, the Jury ought not to be allowed to take into consideration the confession of one prisoner as against his fellow prisoners.

With the last decision, as at present advised, we do not agree. We think that if a confession is to be used at all, it must be used by the Tribunal which is to deal with the case, that is to say, the Judge and Jury when the trial is by Judge and Jury, and Judge and Assessors where that mode of trial is adopted; and the word "Court" must therefore mean the Tribunal, what-

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In re ASHUTOSH CHUCKERBUTTY.

Reference.

ever that Tribunal may be. Again, if it is to be used at all, it cannot, we think, be used as anything else but as evidence. We agree, however, in thinking with the learned Judges who have decided the other cases, that it is material of the very lowest order and of far less force than the evidence of an accomplice, which itself ought to be accepted only under most exceptional circumstances without corroboration, inasmuch as the confession is made without oath or affirmation, and the person making it is not subject to cross-examination.

It appears to us that there is some conflict of opinion as to whether such confessions, when used against others, only stand in need of corroboration, or whether, as ruled in the 24 W. R., Crim., 42, (with which decision we concur, differing, as it seems to us that it does, from the course taken in others of the cases we have referred to), that such confession cannot be used as the basis of a case, but merely as corroborative of other independent evidence.

The questions we would wish the Full Bench to consider are:—

1. Whether a confession made by one person, who is being tried jointly with others for the same offence, and affecting himself and some other such person, (and which is proved,) is to be treated as "evidence" against such other person under section 30 of Act I of 1872; or whether the words the Court may take into consideration such confession, &c., to the end of the section, mean that such confession is to be treated, not as "evidence," but in some other manner, and if so, in what manner should such confession be treated?

2. Whether the word "Court," as used in that section, means the Judge only in a trial by a Judge with a Jury, or includes both Judge and Jury?

3. Whether such a confession, made by one such person, may be used as the basis of proof of the offence charged as against the other, and if corroborated, may sustain a conviction; or whether it is necessary, in order to sustain a conviction, to use such confession only as itself corroborative of other independent evidence?

Baboo *Bhoirub Chunder Bannerjea*, for the Accused.

Kilby, for the Prosecution.

The following judgments were delivered by the Full Bench (1) :—

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In re ASHUTOSH CHUCKERBUTTY.

Judgment.

GARTH, *C.J.*

GARTH, *C.J.* :—

I am of opinion, that under section 30, the confession of a prisoner, which affects himself and some other prisoner charged with the same offence, becomes, when duly proved, admissible in evidence as against both prisoners, and must be so dealt with by the Court.

When this confession has been *duly proved*, it may, by the express language of the section, be taken into consideration against either prisoner; and I do not see in what other way it can be taken into consideration than as evidence. There is no provision in the section by which the confession is to be receivable against the prisoner in one way, and against the other prisoner in another way.

But, although the section does, in my opinion, make the confession admissible in evidence against either prisoner, the weight which ought to be attached to such evidence, and the question, whether, taken by itself, it is sufficient in point of law to justify a conviction, is a question for the Judge who tries the case.

A confession by prisoner A, which involves the guilt of prisoner B, is, of itself, unsupported by other testimony, evidence of the weakest possible kind against B. It is simply the statement of a third person, not made upon oath or affirmation, and I am of opinion that no Court ought to convict prisoner B upon such evidence.

I consider, moreover, that if a prisoner were convicted upon such evidence, whether by a Jury or otherwise, and were to appeal to this Court, the conviction ought to be set aside; and, further, if any Sessions Judge, trying such a case before a Jury, ought to direct them to acquit the prisoner. How far any corroborative evidence would be sufficient, coupled with the confession, to convict a prisoner, must depend upon the circumstances of each particular case.

I consider that the word "Court" must mean the Court before which the trial of the prisoner is to be had, and, in a Jury trial, it must mean the Judge and Jury. I cannot think that the word

(1) GARTH, *C.J.*, JACKSON, MARKBY, AINSLIE, and MCDONELL, *J.J.*

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"Court" is intended to mean "the Judge and Jury," as regal one portion of the confession, and the Judge only, exclusive of t Jury, as regards the other portion.

If the confession is corroborated by other evidence, I do n think it matters whether, in proving the case at the trial, the co fession precedes the other evidence, or the other evidence preced the confession. The course of proof in each case is a question convenience for the prosecution; and they have a right to brin forward the evidence in any order they may think fit.

JACKSON, *J.*

JACKSON, *J.*:—

In my opinion, the confession spoken of in section 30 the Evidence Act,—to put the intention of the Legislature int a common English legal phrase,—"is evidence." I also thin it evidence for a Jury at a Sessions trial in India, but I think the same time it is not singly sufficient to support a conviction that is to say, an accused person other than he who has confessed cannot lawfully be convicted upon such confession alone, nor, i my opinion, ought he to be convicted on the ground of such con fession corroborated by circumstantial evidence, unless the cir cumstances constituting corroboration would, if believed to exis themselves support a conviction.

In considering such questions as these, it appears to m that embarrassment and difficulty will be greatly lessened i instead of assuming the English law of evidence, and the enquiring what changes the Evidence Act has made in it, w regard, as I think we are bound to do, the Act itself as co taining the scheme of the law, the principles, and the appli tion of those principles to the cases of most frequent occurrence

It may be that, as observed by Mr. Norton in his pref (Law of Evidence, 8th Edition), the framer of the Act ove estimated what had been done when he claimed to have rep duced within the compass of his 167 sections the whole Taylor's work that was applicable to India, and there can be doubt that cases must arise for which no positive solution can found in the Act itself; and in such cases we shall probably justified, and shall always be safe, in adopting English rules so far as they follow, or are in accord with the general lines

the Act. But in respect of matters expressly provided for in the Act, we must, so to say, start from the Act, and not deal with it as a mere modification of the law of evidence prevailing in England.

The Legislature, in my opinion, has not avoided calling the confession of an accused person "evidence" against a co-prisoner. It has not so called it because that is not the phraseology of the Act. What its framers appear to have had chiefly in view, and what they have expressed in the way which they considered most suitable, was, *first*, what facts are relevant and what irrelevant for the purpose of producing a given belief; and, *second*, in what manner such facts as are relevant are to be proved. The definition or explanation of the expression "proved" is:—"A fact is said to be proved when, after considering the circumstances before it, the Court either believes it to exist, &c."

It seems to follow, therefore, that if a relevant fact is proved, and the law expressly authorises its being taken into consideration, that is, considered for a certain purpose, or against persons in a certain situation, the fact in question is "evidence" for that purpose, or against such persons, although the result has not been expressed in those words by the Legislature; and being "evidence," it must be used in the same way as everything else that is "evidence."

What the Legislature intended to denote whenever the word "evidence" is used in the Act, is carefully explained in the interpretation clause.

A confession is an admission, and, by section 21, admissions are relevant. Ordinarily, such admissions can only be proved against the person making them, and therefore, if the prosecutor in a trial before the Court of Session proved a confession made by a person then under trial, the Court would be obliged to hold that it was relevant, and could be considered only against the person making it; but the 30th section expressly says that such confession, when proved, may be considered as against other persons, being jointly tried for the same offence, who are affected by it. The first point, therefore, seems made out by the terms of the Act itself.

In truth, it seems impossible to avoid in such cases producing an effect upon the mind, when a confession is read, extending

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to every person named in the confession; even the Judge, with the best balanced mind conceivable, if he spoke with absolute sincerity and self-examination, would probably admit that his mind was in some degree affected by the confession of one man criminating another, provided that he believed the confessing prisoner to be in the main veracious. It may be, therefore, that the Legislature did wisely in recognizing and taking under its control the impression thus unavoidable, which might actually do more harm if unrecognized.

The confession being thus what is called "evidence," is, it seems to me, clearly a matter for the Jury to consider. So far as I can call to mind, the only mention of a Jury in the Evidence Act occurs in section 166, which prescribes how questions may be put by Jurors. But certainly neither in that Act nor in the Code of Criminal Procedure is there, so far as I am aware, any trace of an intention to separate evidence which may be considered by a Jury from that which may be considered by a Court.

Nor, in my opinion, does the definition of the word "Court," in the Evidence Act, exclude the Jury; it runs thus: "Court includes all Judges and Magistrates and all persons, except arbitrators legally authorized to take evidence;" but it does not therefore necessarily exclude a Jury, for when a definition is intended to be exclusive, it would seem the form of words (as in the next following definition) is "means and includes."

Besides, it appears to me that, for the purposes of the definition, the Jury are authorised with the Judge to take evidence. They certainly hear it, and decide upon its value.

As to the language of section 255 of Act X of 1872, the word "evidence" there is not, I think, used with reference to its definition in the Evidence Act; and even if it were, I do not consider that it would create any difficulty.

It seems to me impossible to conceive that the Legislature should have intended that confessions admitted to consideration under such circumstances should be used in any other way than by making them (to use the English term again) "evidence," or that, having made them "evidence," and having contemporaneously provided for the trial of a large class of offences by a Jury invested with the power of determining questions

act, they should have silently withdrawn such "evidence" from the consideration of the Jury, permitting it to be considered by the Court, which has not the function of deciding on the facts.

There remains the question of the effect to be given to such confessions, and this point also appears to me not doubtful.

The confession clearly cannot stand higher as to probative force than the testimony of an accomplice, who is declared to be a competent witness against an accused person (section 133); and the law does not say of the confession as it says of such testimony, that "a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." That being so, I consider that we are free to lay down the rule which would undoubtedly prevail in England if it were possible that such matter could be admitted, and to hold that a conviction based upon such confession alone would be illegal; and not only so, but that such confession will not legally suffice when corroborated by other facts of which evidence is offered, unless those facts are such that, if believed to exist, they would of themselves suffice to support a conviction.

I need hardly advert to the fact, that the Legislature, while declaring that a conviction is not illegal because it depends on the uncorroborated testimony of an accomplice, at the same time enumerates examples of facts which the Court may presume, mentioning prominently this one, that an accomplice is unworthy of credit unless he is corroborated in material particulars; and the facts afterwards instanced as fit to be considered for the purpose of limiting the application of this maxim have reference, I conceive, only to the case of accomplice witnesses, as the illustration (b) [to section 113 of the Evidence Act] itself has also. I would answer the questions put as above stated.

MARKBY, *J.*:—

MARKBY, *J.*

Upon a question of the construction of an Act of Legislature it is very desirable that there should be no dissentient opinion. My learned brethren having come to the conclusion that a conviction by a Jury, upon the uncorroborated confession of an accomplice, would, except as against the accused person who

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makes the statement, be illegal, I am content to abandon m own doubts and to concur in their decision, that the confessio of an accomplice is, by the law of India, evidence against hi fellow prisoner.

AINSLIE, *J.* :—

Courts of Justice, in dealing with questions of fact, have to determine whether the alleged facts are proved, disproved, or not proved. They can only do this by considering the matters before them bearing upon the existence or non-existence of the alleged facts, and whatever goes to show the existence or non-existence of a fact, is evidence in respect of that fact.

The Indian Evidence Act, in the 30th section, speaks of certain confessions by a prisoner as proper to be taken into consideration, not only as against the person by whom they are made, but also as against any other person who is being tried jointly for the same offence. Such confessions may legally go to make up the proof of the offence as against the latter, and if so, it is impossible to describe them as anything but evidence. In the case of a confession proved by oral testimony, or previously reduced to writing by a Magistrate, and proved by the production of the record, the definition of "evidence" in section 3 of the Evidence Act will clearly include such proof. There can be no reason for holding that a confession made during a trial in the Court of Session in open Court is to be treated as something different; therefore, I hold that all confessions which can legally be used under section 30 are evidence.

In the case of trial by Jury, it is specially the province of the Jury to determine whether the evidence before it, adduced prove the charges laid against the accused, is trustworthy. is the duty of the Judge to exclude irrelevant evidence, but regards the evidence which is decided to be relevant, it is the duty of the Jury to determine on its credibility, and generally its sufficiency.

If a case is left to go to a Jury at all, the whole of the admissible evidence must go to the Jury, and therefore the word "Court" in section 30 must include the Jurors who are to determine on the evidence. But under section 251, Criminal Pro

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dure Code, a Sessions Judge is empowered to stop a case without referring the evidence to the Jury when he thinks there are no grounds for proceeding, and to direct the Jury to return a verdict of acquittal.

To a certain extent, therefore, the Judge is to determine on the sufficiency of the evidence, and he is empowered to direct a Jury to return a verdict of acquittal when there is no evidence to go to it except the uncorroborated statement of a confessing fellow-prisoner under trial at the same time. I think that he is not only empowered, but bound to exercise this power. The case does not come within the words of section 133, taken strictly; and that section itself must be taken with illustration (b), section 114, which shows that it is reasonable to presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The particular materials, as has frequently been pointed out, are those which go to connect the accused with the offence, and not merely those which go to corroborate the general story of the crime. There is not, in my opinion, anything in the law inconsistent with the view, that Sessions Judge is bound to stop a trial when there is nothing against an accused person but an uncorroborated statement of a fellow-prisoner being jointly tried for the same offence; and that failure to do this amounts to an error in law, which will vitiate conviction by a Jury arrived at under such circumstances.

McDONELL, *J.*

McDONELL, *J.*:—

On the first and second points I agree with my learned brethren. I took the same view when referring the case to the Full Bench. On the third point, I entirely concur in the judgment of Mr. Justice JACKSON.

[CRIMINAL REVISIONAL JURISDICTION.]

1878
June 19th.

IN THE MATTER OF SHEO SURN LALL . . . PETITION

Section 491, Code of Criminal Procedure—Security to keep the peace—bable resistance to lawful Collection of Rent.

The petitioner, a *tehsildar*, applied to the Police for assistance to tect him while distraining the crops of certain ryots for arrears of On this being reported to the Magistrate he required the petition furnish security to keep the peace on the ground that any riot might result from the resistance of the ryots to the attachment of crops would be attributable to his act. This order was set aside b High Court as illegal, because the Magistrate had not found th petitioner himself was likely to commit a breach of the peace.

THIS was an application made to the High Court as a C of Revision to set aside, as contrary to law, an order of Magistrate of Shahabad requiring the petitioner to fur security to keep the peace.

Baboo *Chunder Madhub Ghose* and Baboo *Juddonath Lahir* the Petitioner.

The facts of this case sufficiently appear from the follow judgment of the High Court (1):—

We have read the Magistrate's order, and the grounds which it was passed. He finds that the petitioner is tehsildar of the village of Atmi, and that there are disp between his employee, who is the ticcadar, and the cultivator the village respecting the rate of rent. He also finds that petitioner applied to the Police to protect him while attach the ryots' crops for arrears of rent; and, considering that any which may result from the resistance of the cultivators to attachment of their crops will be attributable to the petitio he has bound him down under section 491, Criminal Proce Code.

(1) MITTER and MACLEAN, *J.J.*

We are of opinion, that as the Magistrate has not found that he petitioner is himself likely to commit a breach of the peace, he ought not to have held him responsible by anticipation for the result of resistance to his acts which are not shown to be illegal, or likely to induce a breach of the peace. We set aside the order complained of. 1878

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF MUSSAMUT SURGEE, (CONVICT.) *July 24th.*

Jurisdiction—Third Class Powers—Second Class Powers—Magistrate—Code of Criminal Procedure, section 294.

On the 22nd of May 1878, a Deputy Magistrate, invested with 3rd class powers only, sentenced an accused person to three months' imprisonment under section 417 of the Penal Code, thus exercising 2nd class powers. On appeal, the Magistrate, on the 18th of June, annulled the sentence and directed a new trial, under section 284 of the Code of Criminal Procedure. On the 26th of June the Government issued a notification, investing the Deputy Magistrate with 2nd class powers, to take effect from the 25th of March to the 31st of May 1878.

Held, that the notification did not render the Magistrate's order illegal, as the Deputy Magistrate had no jurisdiction to exercise 2nd class powers on the 22nd of May.

REFERENCE under section 296 of the Code of Criminal Procedure, from the Magistrate of Dacca. The facts of the case set out as follows in the Magistrate's letter:—

"On the 22nd of May, Mr. C. G. M. Shircore, Deputy Magistrate, who held only 3rd class powers, but who was, erroneously, using 2nd class powers, sentenced the accused under section [illegible] of the Indian Penal Code, to three months' rigorous imprisonment. When the case came up on appeal, on the 18th June, annulled the sentence under section 284 of the Code of Criminal Procedure, and directed a re-trial. After that in the *Gazette* of June 1878, pt. 1, p. 703, Mr. Shircore was invested with 2nd class powers, with effect from the 25th of March to the 31st May 1878. My order annulling the sentence is now, therefore, [illegible] and I ask the High Court to quash it and direct me to hear the appeal on its merits."

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[illegible]

The judgment of the High Court (1) on the reference submitted is as follows:—

We do not think it proper to interfere. Mr. Shircore had no jurisdiction on the 22nd of May, when he convicted and sentenced the accused. The order investing him with jurisdiction was not issued by Government until the 26th of June, and could not affect the District Magistrate's order on appeal, which was a proper order, inasmuch as Mr. Shircore had no jurisdiction on that date.

[illegible] MARKBY and PRINSEP, J.J.

[CIVIL APPELLATE JURISDICTION.]

BABOO SOOMRUN THAKOOR AND OTHERS . DEFENDANTS;

AND

CHUNDER MUN MISSER AND OTHERS . . PLAINTIFFS.

Mitakshara Law—Joint Hindu family—Alienation by members of joint family—Alienations made without necessity—Purchaser at execution sale—Right of.

Where several of the members of a joint Hindu (Mitakshara) family pledge the family property for repayment of a loan, and the creditor obtains a decree against his debtors, in execution of which he sells purchases, and takes possession of the property pledged, then, in a suit by the other members of the family for recovery of the property on the ground that the pledge was made without necessity or for immoral purposes, the purchaser is entitled to retain so much of the property as belonged to his judgment-debtors, and to have that partitioned off from the remainder.

Deen Dyal Lall vs. Jagdeep Narain Singh, 1 C. L. R., 49; L. R., 4 Ind. App., 300; followed.

SPECIAL APPEAL from a decree passed by the Judge of Tirhoot, reversing that of the Second Subordinate Judge of the District.

There were two sets of defendants in this case. The second defendants who, with the plaintiff, form a joint Hindu family, mortgaged the property in dispute, which was joint family property, to the first defendant, who on the 28th of January and

21st of March 1871, obtained two *ex-parte* decrees on these bonds. In execution of these decrees the decree-holder sold the property, became himself the purchaser, and took possession on the 28th of Srabun 1281 F.—6th of August, 1874.

The plaintiff now sues to recover possession of the property, on the ground that the money borrowed on the bonds was borrowed for immoral purposes, and not for the purposes of the joint family. The second defendants did not defend the suit; the first defendant alleged that the property was the separate property of his mortgagors, the second defendants. The suit was dismissed with costs, but, on appeal, this decision was reversed and the cause remanded. On remand, the suit was decreed with costs, on the ground that the first defendant had not shown a legal necessity on the part of his mortgagors for borrowing the money. Defendant then brought this special appeal.

Baboo *Chunder Madhub Ghose*, for Appellant.
Baboo *Gopal Lall Mitter*, for Respondent.

The judgment of the Court (1) was delivered by

AINSLIE, *J*:— AINSLIE, *J*.

This is a suit by a member of a joint family against the auction-purchaser of the rights and interests of other members of the family who executed a bond mortgaging their shares as security for a loan. The auction-purchaser brought a suit on the bond, and, having obtained a decree, put the mortgaged properties up for sale in execution thereof, and purchased it himself.

The lower Appellate Court has found, as a fact, that the family was joint; but this is not a matter of any material importance now, because the question of the rights of an auction-purchaser in such a case as this has been determined by a recent judgment of their Lordships of the Judicial Committee of the Privy Council, on the 25th of July last, reported in 1 Calcutta Law Reports, page 49, *Deen Dyal Lall* vs. *Jagdeep Narain Singh*. Their Lordships, while refraining from expressing any dissent from the decision of a Full Bench of this Court, in the case of *Sadaburt Pershad Singh* vs.

(1) AINSLIE, *J*.

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BABOO SOOMBUN THAKOOR v. CHUNDER MUN MISSER.

Judgment.

AINSLIE, J.

Phoolbas Kooer, 3 B. L. R., 31 F. B., in respect of voluntary ali ations, have determined that, as regards sales in execution of decr the rights and interests of a debtor in a joint family property m pass to an auction-purchaser, and that the auction-purchaser h a right to demand a partition of the interest so acquired by hi This being so, it appears to us that, if an auction-purchaser can, a plaintiff, come into Court and demand a partition of the intere of the persons whose rights he has acquired, he is equally entitle as a defendant, to set up that right of partition against a memb of the joint family who seeks to reclaim the property which h come into his possession.

In the case before the Privy Council, the order that was m took a peculiar form, because, I apprehend, there was a peculiar in that case. One of the members of the joint family had been represented in the suit, and therefore a final declaration as the rights of the several members of the family could not then made; and it may be that their Lordships thought that it w unnecessary to re-open that particular case when the same questi could be as well tried in a separate suit by the auction-purchaser.

In this case, however, we think that, as the suit is to go back the first Court, there is no reason why a final adjudication shou not be arrived at. The Court will ascertain from the parties, t persons who are admitted or said to have been members of the jo family at the time of the execution sale; and if all the memb are already parties to the present suit, the Court will at once go and determine any question which may arise between them. any person, who is said to have been entitled to any share at t time, is not on the record as a party, the Court will take proper s to put him or her on the record. It will then decide what sh would actually have come on partition to the judgment-debt had a partition taken place on the day of the sale; and plaintiff's right to recover from the defendant will depend the amount of shares determined. If those shares amount to whole 13 annas 6 gundas 2 cowries 2 krants in the possessi the defendant, of course the suit will be dismissed; otherwise, plaintiff will be entitled to recover proportionately.

The effect of this order will be to set aside the order of Subordinate Judge, dated the 7th of July 1877, and to remand

case to the first Court to be disposed of with reference to the above observations, and for an order in respect to the costs incurred in the Courts below. The costs of this appeal shall be borne by the respondent. 1878

[CIVIL APPELLATE JURISDICTION.]

R. R. MACNAGHTEN. . . . . DEFENDANT;

AND

LALLA MEWA LALL, AND OTHERS . . . . PLAINTIFFS.

July 3rd

No. 2461 of 1877.

Landlord and Tenant—Rent, Liability for—Mortgagee of Lessee—Lease, Liability of transferee of.

Except under special circumstances, which the plaintiff must prove, a tenant defendant cannot be held liable for the rent which has accrued due prior to his taking possession.

Hence, if A leases land to B, who transfers the lease to C, and C mortgages to D, who afterwards forecloses his mortgage and takes possession of the demised premises, D cannot be held liable for any rent which has accrued due prior to his taking possession.

SPECIAL APPEAL from a decree passed by the Judge of Bhagulpore, affirming that of the Moonsiff of Begooserai. The judgment appealed from is as follows:—

"One Paras Nath Pandey took a lease from the plaintiff of their share in an estate. The lease runs from 1278 to 1286. Subsequently he transferred his interests to a Mr. Fitzpatrick, who again mortgaged his interests to Mr. Macnaghten. Macnaghten foreclosed and came into possession of the estate in place of Fitzpatrick in Jeth 1282, that is, when the two-thirds of 1282 were over.

Plaintiff sues in the present suit Paras Nath Pandey's heirs and Mr. Macnaghten for the rent to which they are both [liable] for the lease from Bhadur 1281 to Bhadur 1283. The Moonsiff has given the plaintiff a decree against Paras Nath's heirs and Macnaghten. The latter appeals on the ground that he was plaintiff's tenant during 1282, and that he had preferred the lease of 1283.

1878

ACNAGHTEN v. LALLA MEWA LALL.

Statement.

"It is urged that appellant is not the heir of Mr. Fitzpatrick, that he cannot be liable for his debts, and that the Full Bench case of April 1864, B. L. R., supplementary volume, (page 54, *Kearnes* vs. *Bhowani Churn Mitter*,) decided that a person purchasing a factory without purchasing its debts and credits could not be held to be liable. The decision cited in no way applies to the present case. It was an old outstanding debt for rent of a lease which had lapsed. In this case the appellant by foreclosure of his mortgage entered into enjoyment of this lease which is still in force. Plaintiff, finding him in actual possession in place of Fitzpatrick, from whom he had formerly received the rent, is entitled to sue him for the rent.

"Together with this appeal has been argued the appeal preferred by Paras Nath's heir. It is urged that the plaintiff was aware of the sale to Fitzpatrick, and that therefore *cannot be made liable*. The mere fact of knowledge of the sale is not sufficient to free the original lessee from liability. The lease was a temporary one, and therefore not one which under section 26 required registration in the sherishta of the zemindar. The plaintiff, therefore, was not obliged to own the person to whom the lease was transferred. There is nothing in the evidence to show that he did not recognize the transfer as to shift from Paras Nath and his heir the liability he contracted under the lease. The Moonsiff was, therefore, right in passing a joint decree against the two sets of defendants."

The District Judge dismissed the appeal with costs, and the defendant specially appealed to the High Court.

Paul, (Advocate General,) for the Appellant.

The Respondent did not appear.

The judgment of the High Court (1) was delivered by

JACKSON, *J.*

JACKSON, *J*:—

It is, no doubt, an ordinary rule, that an incoming tenant not liable for the rent which has fallen due prior to the time his entry. But that may be subject to special circumstances

to be proved on the part of the plaintiff, which may make the defendant specially liable in certain cases. But there is nothing of that sort, apparently, in this case. We think, therefore, that the appellant's contention is correct, that he ought not to be held liable for the rent prior to entry. 1878

We observe, moreover, that the Court below has made a decree which cannot be supported, because it has made both the original lessee and the incoming tenant liable for the same rent. The judgment, to the extent necessary under this decision, as against the appellant, must be set aside with costs.

[CIVIL APPELLATE JURISDICTION.]

SULTANCHUND, AND ANOTHER. . . . . DEFENDANTS; *July 22nd.*

AND No. 9 of 1878.

FERDINAND SCHILLER, AND OTHERS. . . PLAINTIFFS;

Breach of Contract—Rescission—Damages—Payment on Delivery—Contract Act, sections 39, 51, 55.

Defendant agreed to deliver to plaintiff a certain quantity of rice, which the latter agreed to pay for on delivery. The defendant delivered, in several instalments, a portion of the rice contracted for; the plaintiff paid only part of the price of the quantity of rice delivered, declining to pay the whole until an allowance should be made to him in respect of certain stipulations in the contract which the defendant had not adhered to. In consequence of this refusal, the defendant rescinded the contract. *Held*, that the rescission was wrongful, and that the plaintiff was entitled to damages therefor.

Sections 39, 51, 55, of the Indian Contract Act, IX of 1872, discussed. *Frieth* vs. *Burr*, L. R, 9 C. P., 289, followed.

APPEAL from a decision of Mr. Justice PONTIFEX, in the Origi- Civil Jurisdiction of the High Court, decreeing the plaintiffs' with costs.

suit was for damages for wrongful rescission of a contract the defendants had entered into with the plaintiffs. The of the contract are contained in the sold note, which is as :—

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SULTANCHUND v. SCHILLER.

Statement.

"*Calcutta, 23rd February,* 1877.

Baboo *Sultanchund Kabulchund.*

DEAR SIRS,—I have this day sold, by your order and on your account, the following goods to Messrs. Borradaile, Schiller & Co., 200 tons of up-country new small grain linseed, average quality of the crop of 1877, at the rate of Rs. 3-13-6 per bazar maund, delivery to be taken in all April and May 1877, free at the Howrah Station. Buyers to despatch the bags to up-country, on or before the 20th of March 1877. Railway freight for the same payable by the seller. Refraction not to exceed 4 per cent., and with the usual allowances to 6 per cent., exceeding which the sellers to reclaim the same at their expense within one week; failing which buyers have the option to cancel or buy against the seller. Buyers have the option to open and weigh ten per cent. of the bags to ascertain the weight and refraction. Any dispute arising from this contract is to be settled by the selling brokers. TERMS OF SALE.—Cash on delivery.

Your obedient servant,

FRANCIS BEER, *Broker.*"

Before the 20th of March 1877, the plaintiffs forwarded 5,460 bags (the requisite number) for the linseed; and on different days in the first week of May 1877, the defendants delivered 750 maunds, the price of which was about Rs. 2,895. On the 5th of May, plaintiffs paid Rs. 1,000 to the defendants, who, on the 8th of May, demanded payment of the remainder. The plaintiffs replied that the linseed which they had received was damaged, and the refraction far greater than 4 per cent., and that until all claims for damage and refraction were settled, they would not pay in full, but only in part. On the 12th of May the defendants' attorney wrote to the plaintiffs, stating that in consequence of their refusal to pay for the whole of the linseed already delivered, the defendants "hereby cancel the contract, and will make no further deliveries on it." On the same day, the plaintiffs intimated to the defendants, that unless they delivered the remainder of the linseed they would hold them liable; and on the 15th of May the plaintiffs bought in against the defendants at the market rate of the day. The present suit was brought to recover

difference between that and the contract price. The case was heard by Mr. Justice PONTIFEX, who delivered the following judgment:—

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PONTIFEX, *J.*:—

The plaintiffs sue the defendants for having improperly rescinded a contract for the sale of linseed, and for having failed to make delivery under such contract. They claim as damages the difference between the contract price and the price at which they purchased linseed in the bazar to replace the linseed contracted for.

The contract is dated the 23rd of February 1877, and was for sale of 200 tons of linseed, delivery to be given in April and May at Howrah Railway Station, and bags were to be despatched up-country by the plaintiffs, on or before the 20th of March. The terms of the purchase were cash on delivery. In accordance with the terms of the contract, the plaintiffs sent up-country, bags sufficient to contain the quantity of linseed agreed to be sold. Deliveries of small quantities were made between the 1st of April and the 8th of May, which was the date of the last delivery made. The price of linseed actually delivered, subject to deduction for refraction (if any), amounted to about Rs. 2,700, and out of that sum the plaintiffs had paid the defendants Rs. 1,000. Upon being called upon to pay the balance, the plaintiffs refused or neglected to pay, seemingly on the ground that they claimed some deduction for refraction. Upon this the defendants considered they had the right to rescind the contract, and accordingly without any further explanation wrote the letter of the 12th of May 1877, purporting to rescind the contract.

It may be questionable whether the defendants had the right to insist upon payment under the contract until they had completed their part of the contract by delivery or tender of the whole subject matter. Under section 52 of the Contract Act, the nature of the transaction required delivery to be made before payment could be called for, and it might be contended that delivery meant delivery of the whole of the 200 tons, but it is not necessary to decide the case on that point. No evidence has been given to show whether the bags sent up by the plaintiffs had been

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filled. This was in the defendants' knowledge only; but if the bags had been filled with the seed contracted for, then the matter would no longer have rested in contract, but the property in the seed would have passed under sections 78 and 84 of the Contract Act to the plaintiffs. For there was a part delivery to bring the case within section 78, and there would have been an ascertainment under section 84, within the terms of the illustration to that section. If the goods had been ascertained and the property in them had passed to the plaintiffs, the defendants' proper remedy would have been, under section 107, to give notice to the buyer of his intention, and to resell the goods after the lapse of a reasonable time. But, as a matter of fact, there is no evidence to show that the goods contracted for had been so ascertained as to pass the property in them to the buyer.

In this state of circumstances, the defendants rely on section 51 and section 39 of the Contract Act as a defence to the suit; but section 51 would not by itself alone enable the defendants to rescind the contract. It would give no further right to the defendants than the right to refuse to make further advances until payment had been made for what had already been delivered. Section 39 is more precise. It is alleged that, by the introduction of the words "in its entirety" into that section, the law of India with reference to contract is rendered different from English law on the subject. If section 39 was applicable to such cases as the present, one would expect an illustration more apt than those that are used. The illustrations refer to two cases in which a singer wilfully absents herself from the theatre at which she was engaged to sing; but if the section was intended to apply to cases like the present, we might have expected an illustration relating to a contract for the sale of goods followed by partial non-payment or partial non-delivery.

However, even if that section did apply, I am of opinion that the plaintiffs did not refuse to perform or disable themselves from performing their promise in its entirety, so as to bring the case within that section and enable the defendants to put an end to the contract. But I do not consider that section is meant to govern such cases as the present. If it was so intended, it seems to me that there would be no necessity for section 55, and the

section would be mere surplusage, or it would conflict with section 39 by confining the power of rescission to cases in which time is of the essence of the contract. In my opinion, section 55 governs this case, and I think, that looking to the whole scope of the transaction which the Court is bound to do, it was not the intention of the parties that payment at the precise time of delivery for the small quantities actually delivered should be of the essence of the contract. If the case was governed by English law, then it is clear the plaintiffs would be entitled to recover—*Freith* vs. *Burr*, L. R., 9 C. P., 208; *Bloomer* vs. *Bernstein*, L. R., 9 C. P., 588; *Exparte Chalmers, in re Edwards*, L. R., 8 Ch., 289; *Morgan* vs. *Bain*, L. R., 10 C. P., 15.

The plaintiffs are, in my opinion, entitled to a verdict for the difference between the contract price and the price at which they subsequently bought linseed in the market, and they must have their costs.

The defendants appealed on the grounds: (1) that the defendants had not broken their contract; (2) that the defendants were justified in rescinding in consequence of plaintiff's refusal to pay; (3) that the plaintiffs, having broken their contract, are not entitled to maintain a suit for damages for rescission; (4) that the damages ought to have been assessed at the difference between the contract rate and the market rate of the 12th of May instead of the 15th of May.

Bonnerjee, for the Appellant.

The plaintiffs were bound to pay on delivery—*Withers* vs. *Reynolds*, 2 B. & Ad., 882. This they refused to do, and the defendants were justified in rescinding under section 39 of the Contract Act; for a failure to perform a contract in its entirety means a failure to perform any portion of it. Sectious 51 and 55 support the defendants' case. Plaintiffs were bound to carry out their promise, and when they did not, they cannot sue for damages; they were not ready and willing to pay on delivery. *Hoare* vs. *Rennie*, 5 S. H. & N., 19, covers the case; but it seems to have been dissented from in *Simpson* vs. *Crippin*, L. R., 8 Q. B., 14.

Jackson and *Stokoe*, for the Respondents, were not called upon.

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GARTH, *C.J.*

The following judgments were delivered by the Court (1):

GARTH, *C.J.*:—

I think that the judgment of the Court below was right. suit was brought to recover damages for the non-delivery quantity of linseed by the defendants pursuant to contract. contract was to deliver 200 tons of linseed at a certain pr Delivery in all April and May at the Howrah Railway stat Refraction not to exceed 4%, with the usual allowance up to and the terms as to payment were "cash on delivery."

It appears, that between the 1st and 8th May certain delive were made by the defendants, and that a sum of Rs. 1,000 paid on account by the plaintiffs. That left a large balance to the defendants, and as this balance was not paid, the def ants refused to deliver the remainder of the linseed. The fusal was contained in a letter of the 12th May, in which defendant's attorneys write thus:—

"We are instructed to give you notice that, as you failed to pay the price of linseed delivered under Mr. B contract in terms of the said contract, they (our clients) he cancel the said contract, and will make no further deliv under it."

The plaintiff's reply was, that they considered that the whole tons should have been delivered before the defendants entitled to demand payment; but they added, that they quite willing to waive that objection on adjustment of a which they claimed for excess refraction, and an allowance some empty bags which they said had been used by the def ants for purposes unconnected with the contract.

Further correspondence ensued, but the defendants insist the last that on account of the non-payment by the plaintiff the balance due, they would make no further delivery. plaintiffs accordingly bought in other linseed against the fendants, and then brought this suit for the loss which they thus sustained. The learned Judge, in the Court below, de that the defendants had no right to cancel the contract, and the plaintiffs a decree for Rs. 3,088-0-5. The defendants

(1) GARTH, *C.J.*, and MARKBY, *J.*

appealed, and, the amount of damages not being disputed, we have only to consider whether the defendants were justified in cancelling the contract. The defendants rely on the provisions of sections 39, and 51 of the Indian Contract Act of 1872. Under section 39, they say that the plaintiffs not having paid for the goods on delivery, they have refused to perform the contract in its entirety, and that the defendants had, therefore, a right to cancel it. This is not my view of the proper construction of section 39. That section, as I understand it, only means to enact what was the law in England and the law here, before the Act passed, viz., that where a party to a contract refuses altogether to perform, or is disabled from performing his part of it, the other side has a right to rescind it. This rule will be found explained in the notes to *Cutter* vs. *Powell*, 2 Smith's Leading Cases, page 12.

The case of *Frieth* vs. *Burr*, L. R. 9 C. P., 208, is one which is very apposite to the present, and which illustrates the principle of section 39 very clearly. The defendants there had contracted to sell to the plaintiffs 250 tons of pig iron, half to be delivered in two, and the remainder in four weeks, payment to be made fourteen days after delivery of each parcel. The payment for the first parcel was not made for six months, and the defendants did not deliver the second parcel, which was deliverable under the contract at the time when the first parcel was to be paid for. The plaintiffs then claimed to set off as against the price of the first parcel, the loss which they had sustained by non-delivery of the second parcel. The defendants then refused to deliver the second parcel at all, upon which the plaintiffs bought in other iron against them, and sued them for damages for the non-delivery. The Court held that the defendants were not justified in refusing to complete the contract. The plaintiffs had not refused to pay for the iron. They had only neglected to pay for it in proper time, and had tried to set-off their losses against the price of the first parcel.

So in the present case. The plaintiffs never refused to pay for the linseed delivered; they only made a claim for excess [illegible] and empty bags, and expressed their willingness to pay when these claims had been adjusted.

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GARTH, *C.J.*

Before I leave the subject of section 39, I ought p to refer to the illustrations in that section, which have been upon by the appellant in support of his arguments. W going into the very serious question, (which I think it i necessary to do on the present occasion,) as to how i illustrations, which are now so constantly used, have the of controlling or explaining the language of the sections to they relate, it is sufficient for my present purpose to sa one of the illustrations to section 39 instances the case singer engaged to perform at a theatre several nights, wh fully absented herself on one night only. This is said to be a refusal to perform her contract in its entirety that the ma of the theatre was justified in putting an end to the co

It has been urged upon us by the appellant's counsel th default of the singer was only a partial refusal to perfor contract, and that the plaintiffs in this case were equally of a partial refusal to perform theirs. That illustration is p not a happy one; because it may lead, as I think it h in this instance, to misprehension. But the diff between that case and this is clear enough. The singer, by w absenting herself, though on one night only, did in fact altogether to perform an integral and essential part of he tract. By doing so, she put it out of her power to pe her contract in its entirety. But here the plaintiffs have refused to perform any part of their contract. They were ing to pay the sum due as soon as their cross-claims were a ed, and their default consisted in not paying for the linse delivery.

But then, it is argued by the appellant, that section 51 a because the promises to deliver linseed and to pay for it on very were reciprocal promises. But in my opinion that s is not applicable here at all. The section says, that where tract consists of "reciprocal promises to be simultaneously formed, no promisor need perform his promise unless the misee is ready and willing to perform his reciprocal pro Now, applying that section to the present case, the reci obligations were the delivery of the seed and the payment money on the occasion of each delivery. The defendant was

to deliver; the plaintiffs to pay for the linseed. If the plaintiffs had been unwilling or unable to pay, the defendants would have been justified in refusing to deliver; but the defendants did deliver the seed; the neglect to pay in this instance was after delivery when the reciprocity of obligation had ceased: and there is clearly no evidence here that the plaintiffs were unwilling or unable to pay for the deliveries, which the defendants refused to make. The neglect to pay for part deliveries was under the circumstances no reason for refusing to make all further deliveries.

Then Mr. Bonnerjee argues that, under section 55, instant payment was so essential that the failure of the plaintiffs to pay for the part deliveries at the moment of delivery, justified the defendants in cancelling the contract. This argument is not only quite inconsistent with the conduct of the parties in this particular case, but contrary to the known course of delivery in all mercantile contracts of the kind. It involves the supposition that instant payment of the price on each delivery was of the essence of the contract; and that, unless the plaintiffs paid their money down at once upon each delivery, the defendants were at liberty to cancel the contract. Now it must be borne in mind, that the defendants made several deliveries in this case without asking for money at all; and that when money was paid by the plaintiffs it was paid in a lump sum on account. There is nothing, as it seems to me, in this contention; and on the whole, I think the appeal should be dismissed with costs.

MARKBY, J.:—

I also think that the appeal must be dismissed with costs. I agree that the question before us must be determined in accordance with the Contract Act. I also agree with the learned Judge of the Court below, that section 39, whatever it may mean, is not applicable to a mercantile contract of this description.

I think that section 51 would apply, if the defendants, when they came to make delivery, had insisted upon the contract being strictly performed, and payment being made on delivery; but this they did not do.

With regard to section 55, in one sense it might be said that it was of the essence of the contract, because the defendants

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had a right to insist upon immediate payment on delivery; but as I have said, they did not insist upon this.

From the 1st to the 8th of May, deliveries were being made, and only one payment was made, namely, on the 5th May, of Rs. 1,000, and it is not asserted that payment strictly on delivery was ever demanded. As to the earlier deliveries, therefore, the defendants could not, in my opinion, now assert that time was the essence of the contract, and that payment not having been made directly on delivery, the plaintiffs had broken their contract, and so absolved the defendants from any further performance of it.

If the plaintiffs had ever said they would not pay the balance due for deliveries already made, or that they would not pay on delivery for future deliveries, the case would have been different, but they never said that. There was a dispute as to the balance due on past deliveries, but there was no doubt that on this dispute being settled the balance would have been paid, and there was also no doubt that future deliveries would have been paid for, if demanded according to the contract.

Under these circumstances, the defendants cannot say that the failure to pay on delivery strictly in accordance with the contract, justified them in refusing to go on with it.

[CIVIL APPELLATE JURISDICTION.]

JAMES NICOL FLEMING, AND OTHERS . . PLAINTIFFS; 1878 July 24th.

AND

CHARLES KOEGLER . . . . . DEFENDANT. No. 8 of 1878.

Condition Precedent—Shipping Order—Contract—Construction of Contract—Notice to Ship—Refusal to Ship.

Plaintiffs let to the defendants, in Calcutta, a portion of the tonnage of a vessel for a voyage from Calcutta to London. The vessel was then at sea bound for Calcutta, and the shipping order, which was dated the 16th of February 1877, and which formed the contract between the parties, stated that the defendants had taken a certain amount of the tonnage for a voyage to London in the "*Hooper*, S.S., to arrive after the completion of two country voyages," on notice in May or June 1877. After the ship arrived in Calcutta, and after the completion of one country voyage of more than usual length, plaintiffs gave notice to the defendants to ship, but this the latter declined to do, on the ground that they were not bound to perform their part of the contract until the ship had made two country voyages.

Held, (affirming the decision of PONTIFEX, *J.*,) that the clause "after the completion of two country voyages," was a condition precedent, and that the defendants were justified in refusing to ship until that condition had been performed.

Glaholm vs. *Hays*, 2 M. & G., 257; *Ollive* vs. *Booker*, 1 Exch., 406; *Oliver* vs. *Fielden*, 4 Exch., 155; *Tyers* vs. *Ferryhill Iron Co.*, L. R., 10 Exch., 195; and *Bowes* vs. *Shand*, 2 App. Cas., 455, cited.

PPEAL from a judgment of Mr. Justice PONTIFEX, in the iginal Jurisdiction of the High Court, dismissing the plaintiff's it with costs. The proceedings in the Court below will be nd reported in 2 C. L. R., 169.

Jackson, Phillips, and *Hill*, for Appellants.

Jackson:—The learned Judge is wrong in construing "after completion of two country voyages" as a stipulation in favor the defendants. It was put in for the purpose of giving ol Fleming an option to send the ship on two country ages if he pleased, and this appears from the evidence. unsel read the evidence.] That the learned Judge was wrong in construing the clause as a condition precedent on the face of the judgment. If it were a condition pre-

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cedent, nothing else could be substituted for it, yet he thought the two country voyages could be got over by giving notice. In regard to what will be considered as condition precedent, *Ritchie* vs. *Atkinson*, 10 East., 295, and *Davidson* vs. *Swynoe*, 12 East., 381, show that nothing will be considered a condition precedent unless the breach of it frustrates the whole object of the contract, and *Tarraabochia* vs. *Hickie*, 1 H. & N., 183, shows that where, as in the present case, the stipulation is so lax and vague that its meaning is contested, there will be no condition precedent. See also, on the same point, *Storer* vs. *Gordon*, 3 M. & S., 308; *Freeman* vs. *Taylor*, 8 Bingh., 125; *Stavers* vs. *Curling*, 3 Bingh. N. C., 355, 368; *Suger* vs. *Duthie*, 5. C. B., N. S., 45; *Fothergill* vs. *Walton*, 8 Taunton, 576; *McAndrew* vs. *Chappell*, L. R., 1 C. P., 643. *Behn* vs. *Burness*, 3 B. & S., 751, shows the true question to be—Does the stipulation form a substantive part of the agreement? If not, it will not be a condition precedent; and to answer this question, the intention of the parties, with the circumstances and character of the vessel, &c., will be considered. *Bowes* vs. *Shand*, 2 App. Cas., 455, has no application here, as it turned on the question whether rice contracted to be shipped in March or April was the same kind of rice as that shipped in February. In no case were the defendants justified in refusing to ship; they should have asked for a reasonable time—*Tyers* vs. *The Rosedale and Ferryhill Iron Works*, L. R., 10 Exch., 195.

Phillips, on the same side—The question is, whether the words "to arrive after the completion of two country voyages" entitle the plaintiff to refuse to ship unless two country voyages are first made. The plaintiff gave the defendant substantially what he contracted for, as the time taken on the first voyage was equivalent to two, and we wrote to him from Columbo; besides he never complained of insufficient notice, but insisted on the ship's going two country voyages. The defendant is liable then, unless the clause be construed as a condition precedent. Now if there is in a contract a stipulation amounting clearly to a condition precedent, of course it must be so construed; but when it is ambiguous, as it is here, the authorities show that there is no condition precedent; that the clause is ambiguous is clear from this: If I sell a cargo of hemp to arrive per

hip "A," it imports a double condition precedent, namely, that the ship shall arrive and that the hemp shall be on board—*Benjamin* on Sales of Personal Property, 2nd edition, 463, 470; *Smith* vs. *Meyers*, L. R., 7 Q. B., 139. So here the clause "to arrive after completion of two country voyages" may be construed to mean that the plaintiffs should not be liable on the contract, unless the ship should arrive after the completion of two country voyages. With the stipulation in the contract the plaintiffs would not be liable—the contract would be at an end—if the ship happened to be lost before the completion of the two country voyages, without it he would be liable. So that on its face the clause imports to have been inserted exclusively for the benefit of the plaintiffs, or is, at worst, ambiguous, and will not therefore be construed as a condition precedent in the defendants' favour. The defendants were wrong in refusing to ship—*Barker* vs. *Windle*, 6 E. and B., 675.

Paul, (Advocate-General,) and *Bonnerjee*, for the Respondent, were not called upon.

The following judgments were delivered by the Court (1):—

GARTH, *C.J.*:— GARTH, *C.J.*

I think that the learned Judge in the Court below has arrived at a just conclusion in this case. The suit was brought by the plaintiffs, Messrs. Nicol, Fleming and Company, for the breach of a contract made with them by the defendant on the 16th of July 1877, and which is in these words:—

Calcutta, 16*th February* 1877.

"Hooper," S.S., to arrive after completion of two country voyages.
For London.

GRAF and BANZIGER.
1,300 tons oil seeds or wheat.
£3-12-6 oil seeds.
£3-10-0 wheat.
On notice in May or June.
First notice to be given for this cargo.

20 cwt.
NICOL, FLEMING & Co.

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GARTH, *C.J.*

The only question in the case depends upon the true meaning of the words "after completion of two country voyages," and we have to put a reasonable construction upon these words, having regard to the state of circumstances at the time when the contract was made.

The defendant is a German merchant, carrying on business here under the name of Graf and Banziger. Mr. Krieg, one of the assistants in that firm, had been enquiring for steam tonnage for May and June shipments of wheat or seeds; and he had applied to a Mr. Guyon, a freight broker, with that object. Mr. Guyon went to the plaintiffs, and obtained from them the refusal of the steam ship "Hooper," then to arrive from England, for 1,300 tons of wheat or seeds at a certain freight. A memorandum was then first submitted by the broker to Mr. Krieg, which contained no mention of the two country voyages; and the shipping order, which was afterwards drawn up, and which forms the contract between the parties, was also silent in the first instance as to those voyages. This is a fact admitted by both sides, but there is a serious difference between them as to how the words came to be inserted. Mr. Guyon says that they were put in by Mr. Taylor, the plaintiffs' shipping assistant; by way of giving the plaintiffs the option of going two country voyages, before the ship was placed at the defendants' disposal. Mr. Krieg, on the other hand, says that they were inserted at his express instance, after a conversation with Mr. Guyon, in which the latter had informed him of the plaintiffs' intentions with regard to the ship.

A good deal of discussion has taken place here, as well as in the Court below, as to which of these statements is correct; and as the learned Judge in the Court below thought it right to deal with that question, and has laid some stress upon the defendant's version being the correct one, we have not precluded the appellant's counsel from discussing it. But I confess, it appears to me, that in point of law we are bound to construe the instrument, without regard to the question, whether the clause was inserted at the instance of one party or the other. The words must surely mean the same, and be construed in the same way, in either case. It cannot be that they mean one thing if they were inserted at the

instance of the plaintiffs, and another thing if at the instance of the defendants. What we have a right, and are indeed bound to look to, are the circumstances under which the contract was actually signed.

Now it appears from the plaintiff's own evidence that Mr. Krieg was informed by the broker, before the transaction took place, that the ship was on her way from England to Calcutta, and was to arrive in March; that she was then intended by the plaintiffs to take two country voyages; and it appears, also, that a calculation had been made between the broker and Mr. Krieg, the result of which was, that after the completion of the two country voyages, the ship would be ready for the defendant by about the 15th or the 25th of May. In this state of things the contract was entered into, and the way in which the dispute afterwards arose between the parties is this: The *Hooper* arrived from England on the 10th of March; she was then sent on a country voyage, from which she returned on the 9th of May. On the 30th of April the plaintiffs wrote to the defendants a letter in these terms:—

DEAR SIRS,—Referring to our shipping order per *Hooper*, S. S., for London, for 1,000 tons oil seeds and for wheat, we beg to inform you that this Steamer left Colombo yesterday for Calcutta, and we shall likely give you notice for the shipment of above cargo on her arrival.

This letter led to the following correspondence:—

Calcutta, 1*st May* 1877.

MESSRS. NICOL, FLEMING & Co., *Agents, S.S. "Hooper."*

DEAR SIRS,—Your letter of the 30th April was received by us the last evening. We fancy there must be some mistake; our S. O. on the *Hooper* is after completion of two country voyages; for as we are aware, the *Hooper* is returned from her first voyage only. Please look into this, as we have re-let a portion of our shipping order on precisely the same terms as stated above.

Yours faithfully,

GRAF & BANZIGER.

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GARTH, C.J.

Calcutta, 3rd May 1877.

Messrs. GRAF & BANZIGER.

DEAR SIRS,—With reference to your enquiry about the *Hooper's* home loading, we do not think there is much chance of her taking another country voyage, and we shall therefore most likely ask to ship for London; we do not anticipate shippers will have any objection to the arrangement.—Yours faithfully,

NICOL, FLEMING & Co.

Calcutta, 8th May 1877.

Messrs. GRAF & BANZIGER.

DEAR SIRS,—We expect the *Hooper* to arrive in two or three days now; and as she is to go on her berth for London at once, and we are anxious to give her despatch, we shall be obliged if you will have your cargo ready for shipment on our giving you notice of her arrival.—Yours faithfully,

NICOL, FLEMING & Co.

Calcutta, 9th May 1877.

Messrs. GRAF & BANZIGER.

DEAR SIRS,—We shall feel much obliged by your placing alongside the S. S. *Hooper*, cargo as undernoted in terms of shipping order dated 16th February, 1,000 tons wheat and for oil seeds.—Yours faithfully,

NICOL, FLEMING & Co.

Calcutta, 9th May 1877.

Messrs. NICOL, FLEMING & Co., *Agents, S. S. "Hooper."*

DEAR SIRS,—We beg to return your notice of shipment. Our shipping order provides that notice is to be given after completion of two country voyages; now, as the *Hooper* has made only one country voyage, your notice is premature. We decline, therefore, to accept it.—Yours, &c.,

GRAF & BANZIGER.

Calcutta, 10*th May* 1877.

o Messrs. NICOL, FLEMING & Co., *Agents, S. S. "Hooper."*

DEAR SIRS,—In reply to your memo. received late last evening e hold a shipping order in the *Hooper* after completion of two ountry voyages, and we have re-let a portion on the same terms; we have already mentioned to Mr. Guyon that, in order to avoid unnecessary trouble, we are ready to cancel the shipping order although it is a cheap one, provided you can arrange similarly with the firm to whom our re-let has been effected.—Yours,

GRAF & BANZIGER.

Calcutta, 10*th May* 1877.

Messrs. GRAF & BANZIGER.

DEAR SIRS,—We have received your note of yesterday, returning shipping notice of S.S. *Hooper*. We do not wish to enter into any argument about the matter, but by the present we hereby beg to give you notice to ship the cargo of the above Steamer. Failing your complying with the terms of the shipping order granted, we shall take such steps as we may be advised to adopt to protect ourselves from the consequence of the non-fulfilment of contract of your part.—Yours faithfully,

NICOL, FLEMING & Co.

Calcutta, 10*th May* 1877.

Messrs. NICOL, FLEMING & Co., *Agents, S. S. "Hooper."*

DEAR SIRS,—We are in receipt of your letter of to-day, and in reply inform you that we will not ship on the *Hooper* except on terms of shipping order, which distinctly provides that notice is to be given after completion of two country voyages. If you choose to send the *Hooper* direct to London, without reference to our shipping order, you do so at your risk; and we will hold you responsible for any loss we might sustain.—Yours faithfully,

GRAF & BANZIGER.

Upon this the plaintiffs re-let to other parties the space which had been taken by the defendant, for the best freight they could get, and brought this suit against the defendant for the difference between the amount so obtained, and the freight contracted for, viz.,

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Judgment.

GARTH, *C.J.*

Rs. 5,800-9-9. The defendants say that they were not bound to ship their goods until after the *Hooper* had completed two country voyages. The learned Judge in the Court below has taken that view; and that is the point which we have now to decide on appeal.

Now, in construing this contract, we must assume that the clause in question was inserted by the parties for some good purpose, and with some definite meaning.

As observed by Lord CAIRNS in the case of *Bowes* vs. *Shand*, 2 App. Case, 455, which has been so often referred to during the argument,—"This is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." Let us see, then, what the plaintiffs' explanation is of the meaning of these words.

I consider that for this purpose we have no right to look to the evidence to see what Mr. Guyon's views were on the one hand, or Mr. Krieg's on the other, as to the intention of the parties at the time when the contract was made. The argument upon this head has probably been allowed to proceed both here and in the Court below, much further than it ought to have done. To enquire into what the parties said, or intended when the contract was made, is obviously, in my opinion, to let in oral evidence to explain a written contract. The explanation which we do naturally and properly look to, is that which the parties themselves submit to us as the right one, through their Counsel, and which presents itself to our own minds as the true construction of the contract. Now, both in the Court below, and in this Court, the contention of the plaintiffs has been that the words in question were inserted purely for their own benefit; to give them an option of employing the ship if they thought proper, upon two country voyages, between the time of her arrival here in March and the time when she was to take the defendant's cargo in May or June. But is there any sufficient reason for the insertion of the clause? The plaintiffs would clearly have had a right to employ the ship as they chose, after her arrival in Calcutta, whether these words had been inserted or not. The insertion, in point of fact, would rather have the effect of controlling the plaintiffs' rights in that respect, than of extending them

They might, without any such clause, have sent the ship for any number of country voyages, without consulting the defendant, provided she were ready to take the defendant's cargo in the month of May or June; and the insertion of the clause, if it affected their rights at all, could only have prevented them from going more than two country voyages.

Mr. Phillips has certainly, in his arguments, raised a point, (which, so far as I can find, was not suggested in the Court below), that the meaning of the clause might have been to protect the plaintiffs from any claim by the defendant, in the event of the ship being lost during one or other of the country voyages, and so not being available for the purposes of the contract. But he did not refer us to any authority in which the words "to arrive" have been held to mean the same in the case of a contract of affreightment as they do in the case of the sale of goods "to arrive;" and I am certainly not disposed to attach much weight to a construction which has thus been suggested towards the close of the argument, and had apparently never occurred to the plaintiffs or their counsel at any earlier stage of the case.

On the other hand, let us see the meaning which the defendant attaches to the clause in question. His case is, that it was inserted for his benefit, to indicate approximately the time when he might expect the ship to be ready to take his goods; and when we look at the position in which he was placed, it seems impossible to deny, that for this purpose the stipulation might be of great value. The only time fixed by the contract was "May or June." This leaves of course a very long period at the option and disposal of the shipowner; thirteen hundred tons of seeds and wheat is a large quantity. The shipper had to supply himself with these, and to make arrangements as to their carriage to Calcutta. It might, therefore, be of great consequence to him to have the time when the ship would be ready more clearly defined; and this object would undoubtedly be effected by the clause in question. The defendant could ascertain without difficulty the course and probable direction of any country voyage which the ship might take. It would have been easy for him to learn, within a few days, when she would be likely to arrive; and he would thus have an opportunity of making his arrangements, so that his goods should reach

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Calcutta by the time when the ship would be prepared to receive them.

It was argued by the appellants' Counsel that, if the clause in question had been intended to serve any purpose of this kind, the object would have been attained in a simpler and more natural way, by a stipulation that a certain number of days' notice (say twenty) should be given by the plaintiffs to the defendant, as to when the ship would be ready to receive cargo. And this is very true. It is quite possible that other stipulations might have been adopted to answer the same purpose as this one, and it is also possible that some of them might have been more convenient to the defendant than the clause which was here used. But to the plaintiffs, on the other hand, had they carried out what was their intention at the time when the contract was made, the clause adopted might probably have been more convenient than a direct stipulation for twenty days' notice; because if their ship was engaged in a country voyage, it might have been difficult for them to calculate three or four weeks beforehand the precise time when she would be ready.

But whether any other stipulation as to time would or would not have been more simple or convenient, the parties to this contract have chosen to adopt this clause. I consider that one plain object and intention of that clause was to indicate approximately to the defendant the time when the ship would be ready, and that construing it in that sense, it was as essential a part of the contract, and as binding upon the plaintiffs, as any other more direct stipulation as to time, which may have been inserted with the same object.

Now I take it to be perfectly clear law that when a shipowner has contracted to give a certain notice to the charterer, or to do any other act, with a view to inform the charterer when the ship will be ready, the charterer is not bound to ship his goods, until the shipowner has given him that notice or has done that act. Some of the cases have gone very much further than this. Thus in *Glaholm* vs. *Hays*, 2 M. and G., 257, where it was agreed that a ship should proceed from England to Trieste, and there load a cargo upon certain terms; and there was a provision in the charter-party that the vessel was to sail from England "on or before

the 4th of February next;" although the vessel was detained by foul and contrary winds, and proceeded to Trieste as soon as she possibly could after the 4th February, yet, as she did not actually sail from England by that day, it was held that the charterer was exempted from liability to load a cargo. So again in *Ollive* vs. *Booker*, 1 Exch., 416, when a ship was to proceed to Marseilles, and there take a cargo from the defendants, and there was a statement in the charter-party that that ship "was now at sea, having sailed three weeks or thereabouts," and it turned out that the vessel at the time of the making of the charter-party had not been three weeks at sea, but in fact had sailed a week later than was represented, the charterer was held absolved from his liability to load. The Court considered, in that case, that the statement as to the position of the ship at the time when the contract was entered into, was intended to indicate to the defendant the time when the ship would probably arrive at Marseilles; and as that statement was untrue, the defendant was held not bound by his bargain. (See also the case of *Oliver* vs. *Fielden*, 4 Exch., 155.)

In the generality of cases of this kind, the question has arisen where the ship has been behind her proper time; but there is much more reason why, in a case of this kind, the rule as to time should be strictly observed. Where it is agreed that a ship should be ready on a certain day, and she is a few days after her time, the only inconvenience to the freighter usually is, that the shipment of the goods is delayed, and he has to pay so much for demurrage or demurrage, as the case may be. But where notice has to be given, or some act has to be done, by the shipowner, before the freighter is to load at all, the latter cannot reasonably be expected to have his goods ready for shipment, till the notice has been given, or the act done.

But then it was argued by the defendants' Counsel that even though the plaintiffs were in default, in not having gone the third voyage, the case of *Tyers and others* vs. *The Ferryhill Iron Company*, L. R., 10 Exch., 195, shows that the defendants were justified in refusing to perform their contract altogether.

I confess, it appears to me that the case of *Tyers* vs. *The Ferryhill Iron Company* shows nothing of the kind; and that,

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when properly understood, that case has no applicatior present. There the defendants had contracted to sup plaintiffs with 2,000 tons of iron, by equal monthly de extending over the year 1871. By mutual arrangement t the parties, the stipulation as to the time of the delive departed from, and a much smaller quantity than was was delivered up to the month of December. The plaintif required the whole balance of the iron to be delivered in l ber; and the defendants not only refused to do this, but sa beyond the stipulated quantity, which they were bound to in the month of December, they would deliver no more. was in fact refusing to complete the contract in any way any deliveries, merely because the stipulation as to the tir quantity of the deliveries had been departed from by consent. The Exchequer Chamber held that this refusal co be justified. The Chief Justice, COCKBURN, seemed to thi they were bound to complete the deliveries according measure of the stipulated monthly instalments. Mr. BLACKBURN'S view was that they were bound to deliver mainder of the iron within a reasonable time. But the Court was agreed that the defendants were wrong in r to complete their contract, merely because the previous ture from the contract had been assented to by both parties

Now, here the stipulation as to time was never departe by the assent of the parties. If the plaintiffs were bound l as I consider they were—they were wholly in default. The no refusal to complete on the defendants' part. All the was, "your notice to ship is premature. We are not bo ship our goods till you have first done what you con to do." In this it appears to me they were quite right.

I do not enter into the question as to whether any offer by the plaintiffs would have been equivalent to taking a voyage: *first*, because no such offer was made; and, se because I do not consider that we have any right to new contract for the parties. It certainly seems unfo that some attempt at an arrangement was not made, in both parties holding one another at defiance, as they di they have taken their own course in that respect, and

only to determine which is in the wrong. In my opinion, for the above reasons, the appeal should be dismissed with costs.

MARKBY, *J.*:—

In this case we have to put a construction upon a document which is not grammatical in form, consisting, as it does, of a number of words and figures without a single connecting verb throughout. There is not, however, any doubt that it contains the terms of an agreement between the plaintiffs and the defendants, and that the plaintiffs thereby agree to find for the defendants accommodation for a certain description of goods in a certain ship, and that the defendants agree to ship those goods after notice in May or June, paying a certain freight. The ship is described (I am reading from the contract itself) as "the steam ship *Hooper* to arrive after completion of two country voyages, for London," which means, I take it, that the ship is expected to arrive in Calcutta; and that, having taken two country voyages after her arrival in Calcutta, she will then sail for London.

This being so, of course it was necessary, in this suit against the defendant for not shipping the goods according to the contract, for the plaintiffs to show that they offered the defendant a ship substantially answering to this description; and every part of this description is beyond all doubt a material part, except the words upon which the present dispute arises, namely, the words "after the completion of two country voyages." The question is, whether those words are also material, and that is the sole question in this case. For if those words are material, the ship offered, not having been two country voyages after her arrival in Calcutta, but only one such voyage, did not answer the description in the contract, and the plaintiffs must fail. If, on the other hand, those words are not material, then the ship did substantially answer the description given in the contract, and the plaintiffs must succeed.

I do not think that there is any ground upon which we could say that these words are not a material part of the description of the vessel. The only ground suggested why they should not be so was the improbability that the plaintiffs would undertake

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to send a very large steamer like the *Hooper* two count voyages, merely in order to secure this contract for freight. do not think that this is a consideration upon which we are a liberty to enter. Probably the plaintiffs would not have inserted the clause if it had struck them in this light, but they did insert it, and they must be bound by it, if upon the true construction of the contract they promised to provide a vessel of this description.

It is said that these words are not part of the description of the vessel at all, and that they were merely intended to give the plaintiffs the option of going two country voyages if they chose to do so, but these words are so mixed up with other words, which are obviously words of description, that I think they must be taken as part of the description of the vessel which was the subject of the contract. That seems to me to be the literal meaning of these words. It certainly is not their literal meaning that the plaintiffs are to have an option of sending the ship two country voyages if they thought fit, but were to be under no obligation to do so.

None of the evidence seems to me to be of the slightest use in helping us to come to a conclusion as to what the words mean. There is no evidence of any mercantile usage which would control the literal meaning of the words; and the argument that the words having been suggested by the plaintiffs must be taken as intended solely for their benefit seems to me to be fallacious. The fact (if it were a fact) that the clause had been inserted at the request of the plaintiffs could not alter its meaning, or relieve the plaintiffs from any obligation which the terms of the contract, literally construed, would impose upon him. I, therefore, concur in thinking that the appeal should be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

SHAHEBZADAH EBRAHIM, AND ANOTHER. . DEFENDANTS;
AND
FUCKHRUNNESSA BEGUM . . . . . PLAINTIFF.

1878. *August 17th.*

No. 7 of 1878.

Appeal—Right of Appeal—Decision of one Issue—Settlement of Issues—Order, Appeal from—Charter Act, section 15.

On a hearing for settlement of issues, the Judge decided that a certain *hibbah*, which had been relied on by the defendant as an answer to a portion of the plaintiff's claim, was invalid. As regards the rest of the defence, the Judge framed certain issues, which, if decided in the plaintiff's favour, would have rendered it unnecessary to rely on the contents of the *hibbah*. Before the trial of these latter issues, the defendants appealed from the finding as to the *hibbah*. *Held*, that no appeal would lie.

APPEAL from an order passed by Mr. Justice PONTIFEX, in the Original Civil Jurisdiction of the High Court.

This was a suit to ascertain the validity and for the construction of a *hibbahnamah* and a will, alleged to have been executed by Mussamut Omdah Begum, widow of Shazadah Sultan Hossein, and daughter of the late Prince Gholam Mahomed. Omdah Begum, who was possessed of considerable property in Calcutta, died on the 28th of November 1875, leaving surviving one son, the defendant Mahomed Nusseeruddeen, and two daughters, Fuzzunnessa Begum and the plaintiff Fuckhrunnessa Begum. The *hibbahnamah* abovementioned purports to have been executed by Omdah Begum on the 2nd of November 1875, and the will on the 4th of November 1875. Both instruments were registered on the 26th of June 1876. The plaint stated the foregoing facts, alleged that the whole of the property of Omdah Begum was in the hands of the defendant, Mahomed Nusseeruddeen, and prayed that the validity of the *hibbahnamah* and will be ascertained, for construction and effect declared, and for an account and partition.

The *hibbahnamah* deals with half only of the property possessed by Omdah Begum, and purports to be an absolute gift thereof to the defendants, Ebrahim and Hingoo Jaun, infant sons of the

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defendant Mahomed Nusseeruddeen. The will deals with the remainder of the property, one-half of which is bequeathed to the defendant Nusseeruddeen absolutely, while the other half goes to the plaintiff and her sister for life, remainder to the defendant Mahomed Nusseeruddeen. The latter submitted that all and every the provisions of the deeds were valid in law. The case came on for settlement of issues before Mr. Justice PONTIFEX, who delivered the following judgment:—

PONTIFEX, *J.*

PONTIFEX, *J.*:—

I think that in this case I may decide at once that the *hibbah* by itself would not be operative to pass the moiety it purports to pass to the grand children: *first*, because the property was an undivided share; and, *secondly*, because the donor, under the terms of the deed, retained possession of such part of the property as was her own, *i.e.*, the other moiety. For these reasons I think it is invalid; but assuming the *factum* of the deed to have been first proved, the second condition contained in the will (1) is sufficient to pass to the grandsons what the testatrix could validly have devised to strangers, namely, one-third of the property; and if the *factum* of the will is proved, and also the assent of the heir to the provisions in the will, then a gift of the moiety to the grandsons would be good.

I shall raise two issues: *First.*—Did the testatrix execute the instrument propounded as her will? *Secondly.*—If she did so execute it, have her heirs assented to the provisions thereof, and to what extent, and in what manner? Then there will be a subordinate issue: How far did such assent validate the remaining provisions of the will?

The infant defendants appealed on the grounds: *First*, that the *hibbah* was valid; *secondly*, that the learned Judge should have raised an issue as to its due execution and legal effect according to the Mahomedan Law.

(1) The first and second conditions were to the effect that the legatees under the will should not dispute the gift made by the *hibbah*, and that the property dealt with by the latter should remain in Mahomed Nusseeruddeen's possession until the infants should attain majority, and that then he should deliver over possession to them.

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Argument.

Evans, Phillips and *Allen*, for the Appellants.

[GARTH, *C.J.*—Does any appeal lie in a case of this kind? Your contention is, that the Judge refused to take part of your case into consideration. I hardly think there is any appeal.]

Phillips.—The learned Judge has decided that the *hibbah* is void. His judgment is, therefore, a determination of the rights of the parties which is equivalent to a decree; and in all such cases there is an appeal given by the Letters Patent.

[GARTH, *C.J.*—The Letters Patent merely give jurisdiction. The question as to what orders are appealable is governed by the Procedure Code.]

Phillips.—It would be more convenient that important issues of this kind which practically dispose of a case should be determined first of all than that the whole suit should be appealed together. [Counsel referred to *Hadjee Ismail* vs. *Hadjee Mahomed*, 13 B. L. R., 91; *Justices of Calcutta* vs. *The Oriental Gas Co.*, 8 B. L. R., 433; *In re Court of Wards*, 7 W. R., 222; *Ghasseeram Misser* vs. *Williamson and others*, 2 Ind. Jur. (N. S.), 205.]

Bonnerjee, for the Respondent, contended that there was no right of appeal. He distinguished the authorities cited, on the ground that, in the present case, no right had been determined against the defendant.

Phillips, in reply.

The following judgments were delivered by the Court (1):—

GARTH, *C.J.*

GARTH, *C.J.*:—

I consider that in this case the appeal ought not to be heard. The decision of the learned Judge, which is appealed against, is not a judgment or decree which determines or affects the entire claim of the plaintiff. It is a decision which he arrived at on the settlement of issues, upon the validity of a *hibbanamah* which was set up by the defendant as an answer to a portion of the plaintiff's claim.

As regards the rest of the claim, which is not affected by this *hibbanamah*, the Judge has framed certain issues which will come to be tried in due course, but the defendant has thought pro-

(1) GARTH, *C.J.*, and MARKBY, *J.*

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per in the meantime to appeal from this partial decision. N authority has been adduced by the defendant's Counsel to justi an appeal under such circumstances; and I consider, that loo ing to the language of the Charter, as well as upon grounds c judicial convenience, the appeal ought not to be allowed.

The fifteenth clause of the Charter, upon which the appellan relies, says that an appeal shall lie from the judgment of an one Judge of the High Court. I think that the word "judgment" means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character, which merely decides some isolated point, not affecting the merits or result of the entire suit.

I entirely agree with the authorities which have been cited to show that an appeal will lie against the rejection of a plaint, or the admission of a suit, because these are rulings which determine whether the plaintiff has or has not a right to sue at all in the particular case. But if the appellant is right, we might have three or four appeals, all pending in one cause at the same time, and all proceeding contemporaneously with the trial of the suit in the Court below. Thus, upon the settlement of issues, if the Judge were to refuse the plaintiff an issue upon the ground that a part of his claim was untenable, and he were also to refuse the defendant another issue, upon the ground that a deed, which the defendant wished to set up, was bad in law, and upon the trial of the cause, the Judge were to decide one issue in favour of the plaintiff and then adjourn the trial to a future day. Each of these decisions, if the appellant is right, might be made separate subjects of appeal to this Court, and might be proceeding on appeal at the same time that the trial in the Court below as to the rest of the case was going on.

I purposely do not enter into the question as to how far such partial appeals would be admissible in the Mofussil; but undoubtedly, if they were so, they would be attended with much more mischief and inconvenience than they would be in the High Court. I think that this appeal should be dismissed, upon the ground that it is not a judgment within the meaning of section 15 of the Charter.

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MARKBY, *J.*:—

There is some difficulty in reconciling the decisions upon the Letters Patent, but I am inclined to think now that, whereas in this case, the decision is of such a nature that it can clearly be questioned in appeal at some time or other, the matter is more one of convenience and procedure than of strict law. I should have been inclined to think that in this particular case the appeal might be conveniently heard now, but as the Chief Justice thinks that it cannot be heard until the other issues are decided in the Court below, I shall not differ.

[CIVIL APPELLATE JURISDICTION.]

KHERODEMONEY DOSSEE . . . . . PLAINTIFF;

AND

DOORGAMONEY DOSSEE AND ANOTHER . . DEFENDANTS.

Void Bequest—Hindu Law—Devise to a class—Adverse possession—Limitation—Act IX of 1871, *sch. II., cls.* 122 *and* 145.

A devise to a class, some of whom are unborn at the death of the testator, is invalid in Hindu law.

By his will, after giving several legacies, A devised the rest and residue of his estate "to the son lately born to B, and to the son or sons that may hereafter be born to him." *Held*, that the devise was invalid under the Hindu Law.

Leake vs. *Robinson*, 2 Mer., 363; and *Soudamoney Dossee* vs. *Jogesh Chunder Dutt*, I. L. R., 2 Cal., 262; *Tagore* vs. *Tagore*, 9 B. L. R., 377, cited and followed.

Where a residuary bequest is made by a Hindu testator to his executors in trust for certain purposes which fail as being void, the person entitled to the property on failure, *i.e.*, the heir-at-law of the testator, may be barred by limitation as regards the moveable property by cl. 122, sch. II, Act IX of 1871, and by cl. 145, sch. II, Act IX of 1871, as regards the immoveable property.

A trustee for a specific purpose, within the meaning of section 10, Act IX of 1871, is not the same as an express trustee in the English law. (1)

APPEAL from a decree passed by Mr. Justice PONTIFEX, in original Civil Jurisdiction of the High Court, dismissing the plaintiff's suit with costs. The proceedings in the Court below

(1). See note to the proceedings in the Court below, reported in 2 B., 119.

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will be found reported in 2 C. L. R., 112. In addition to the facts therein given, it should be stated that the son of Woodoy Chund Mullick, who is mentioned in the will as living at the time of its execution, died some time after the testator's death, leaving surviving two younger brothers, both born after the testator's death. One of these brothers died unmarried in 1867. It was on behalf of the other that Doorgamoney claimed to hold the property purported to be given by the will.

Evans and *Phillips*, for the Appellant.

Phillips.—We are not called upon here to show that the plaintiff is a trustee, as she herself admits it—*Beckford* vs. *Wade*, 17 Vesey, 95. Being then a trustee for purposes which are void, she becomes a resulting trustee for the plaintiff and cannot plead limitation against her; for, in such a case, a resulting trust is an express trust within the meaning of the Statutes of Limitation—*Salter* vs. *Cavanagh*, 1 Dr. and W., 668; approved in *Watson* vs. *Saul*, 1 Giffard, 197, and in 2 Jones and Latouche, 196. It may be argued that, being a Hindu executrix, the property is not "vested" in her within the meaning of section 10 of Act IX of 1871. But "vested," as there used, has not the peculiar meaning which it bears in English Law. The Act is one intended for the whole of India, and except in the Presidency towns, and perhaps not even there, is there any such thing as "vesting" in the feudal sense.

There is no adverse possession here, and we are in time,—as far as regards the immoveable property—under cl. 145, sch. II Act IX of 1871. The executrix admits that she is holding for the wrong *cestui que trust*, not that she is holding for herself; and *Lister* vs. *Pickford*, 34 Law Jour. Ch. 582, shows, that under such circumstances the *cestui que trust* will not be barred. See *Alley* vs. *Blakeney*, 5 C. & P., 563. The defendant's possession under the will being consistent with ours was not adverse—*Nepean* vs. *Doe*, 1 Smith's Leading Cases, 688; Williams on Executors, 1474. She is a trustee for us—*Dacre* vs. *Patrickson*, 1 D. S., 182.

[MARKBY, J.—A Hindu executor is like an agent acting under a power of attorney.]

Phillips.—*Morice* vs. *Bishop of Durham*, 10 Vesey, 522, at p. 535, and *Ommaney* vs. *Butcher*, 1 T. & R., at p. 273, show what is necessary to constitute an executor a trustee.

The learned Judge has held our claim to be personally barred by cl. 122 of Act IX of 1871; but that clause does not apply, as this suit is not for a share.

[GARTH, *C.J.*—Would you not be barred, supposing your suit came under cl. 118?]

Phillips.—No, my Lord. We could not sue for the residue until all the debts and legacies are paid, as until then there is no residue. *Prior* vs. *Horniblow*, 2 Y. & C., Exch., 200, does not decide whether a residue is a legacy.

This suit is not barred by section 7, Act VIII of 1859. The other suit was by different parties and in a different right—*Moonshee Buzloor Ruheem* vs. *Shumsoonnissa Begum*, 11 Moore, 604-5. There we sued the executrix merely; here we do not. The prayer of the plaint is very different. We were not compelled to join different causes of action though we were entitled to do so.

Hill, for the infant.

A Hindu executor has only a manager's power unless a contrary intention appears—*Sreemutty Dossee* vs. *Tarachurn Coondoo Chowdhry*, Bourke, A. C., 49; *Srimoti Joykali Debi* vs. *Shibnath Chatterjee*, 2 B. L. R., (O.C.), 1.; see also *Charo Bibi* vs. *Baldeo Das*, 1 B. L. R., (O.C.), 24. Here there is a total want of the intention necessary to create a trust —Lewin on Trusts, 72. A fiduciary relation between the parties is not sufficient to make section 10 of Act IX of 1871 applicable. The meaning sought to be put on the word vested by the opposite side would include the case of factors. Trust for a specified purpose here means a trust specified by the author—*Hughes* vs. *Evans*, 13 Simon., 496; *Watson* vs. *Saul*, 1 Giffard, 197; *Dickenson* vs. *Teasdale*, 1 De Gex., J. & S., 52.

Plaintiff is barred as to the moveable property by clause 122 of Act IX of 1871. That is clear on comparing the wording of the clause with section 28 of Act X of 1865. Section 32 of Act X of 1850, and cl. 2, section 6 of Act XI of 1865 are conclusive that cl. 122 includes the present case. Adverse possession of the immoveable property commenced at latest when the debts were

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barred, for then possession could be determined and demanded. That was in 1863, and therefore the suit is barred under Act IX of 1871, sch. II., cl. 145.

The claim is barred by section 7, Act VIII of 1859. *Moonshee Buzloor Ruheem* vs. *Shumsoonnissa Begum*, 11 Moore, 562, is in my favour.

[GARTH, *C.J.*—In that case the right and title were the same as in the previous suit. But in this case the plaintiff was entitled as a creditor to what she had previously sued for; here she claims as heir-at-law and *dehors* the will.]

Hill.—If she could have sued for this property at the time she brought the former suit, she will be barred—*Gones Chundra Chowdhry* vs. *Ram Kumar Chowdhry*, 3 B. L. R., (A. C.), 265; *Abhiram Das* vs. *Sriramdas*, 3 B. L. R. (A. C.), 421; *Jumoona Dossee* vs. *Bamasoonduree Dossee*, 2 W. R., 149.

Lastly, the plaintiff must show that the gifts are invalid. *Nilkaunt Chatterjee* vs. *Peari Mohun Das*, 3 B. L. R. (O. C.) 11, shows that the property will go to those of the class living at the death of the testator.

Evans.—In that case there was no argument on the point in either Court.

Hill.—*Krishnaramini Dasi* vs. *Ananda Krishna Bose*, 4 B. L. R. (A. C.), 231, and Hawkins on Wills, p. 71, show the same thing. [Counsel referred to *Leake* vs. *Robinson*, 2 Mer., 364; *Soudamoney Dossee* vs. *Jogesh Chunder Dutt*, I. L. R., 2 Cal., 262; Jarman on Wills, 149.]

Bonnerjee, for Doorgamoney Dossee.

My client is willing to give up the property to any one the Court may direct. I support, however, the argument of Mr. Hill, and, with him, dispute the soundness of *Soudamoney Dossee's case*, I. L. R., 2 Cal., 262. The rule in *Leake* vs. *Robinson*, 2 Mer., 364, was laid down on the consideration that the vesting was postponed, but here the vesting took place on the death of the testator, and, therefore, that rule does not apply. The same consideration distinguishes this case from the *Tagore case*; here the property is at no time *in nubibus*. Assuming the gift is valid the case does not come within section 10. We are not trustees

at all, and least of all trustees for the plaintiff. Our possession was adverse to the plaintiff, and as agent on behalf of the infants from the death of the testator. Her cause of action accrued then, and she could have come in and sued for what she now claims.

Evans, in reply:—

The point decided in *Soudamoney's case* was very carefully considered. The same point was decided in *Sreemuttee Bramamoyee Dossee* vs. *Jogesh Chundra Dutt*, 8 B. L. R., 400. The reason of the rule is clearly seen when we look into the case of *Leake* vs. *Robinson*, 2 Mer., 364. There, Romilly argued in favour of the will, that, if there were some who could take, and others of the same class who could not, then those who could take would get the property. That would, in effect, be making a new will for the testator. Sir William Grant says (p. 390), that the ground of the rule was, that the Court would not give a series of particular legacies where the testator intended a gift to a class. In the present case it is argued, that on the death of the only living son the estate went to the father as heir to the son, who had a power in him of retaining the property for the other sons when and as they might be born. Such a doctrine is totally opposed to Hindu law. The *Tagore case*, 9 B. L. R., 377, and the *Blindman's case* (*Kalidas Dass* vs. *Krishna Chundra Dass*, 2 B. L. R., F. B., 103) show that when an inheritance vests it vests once for all and cannot be again divested.

The two main points made by the other side are—(1) that the gift to the children is good; and (2) limitation. As to the first point, the gift in this case was in these words—"I give in equal shares to the son lately born to my sister's husband, Sreejoot Woodoy Chund Mullick, and to the son (or sons) that may hereafter be born to him." This gift, which purports, and which I contend, to be an immediate gift to a class, is in the first place void for uncertainty, even if it be not a gift to a class; for, in Hindu law, there can be no perfect gift unless the property passes from one entient being to another. This gift is in equal shares to a person now in existence with persons not in existence; you cannot make good by giving all to the son in existence at the testator's death,

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for that, as was remarked in the *Tagore case*, would be to
a new will for the testator, and would, in this case, be a viol
of his wishes. But then the other side say, that the s
existence at the testator's death may take on behalf of
others, notwithstanding that they may never come into exist
There is nothing clearer than that in Hindu law the un
can never be the objects of gift, and if your Lordships wer
accede to the argument of the other side, you would be d
indirectly that which you could not do directly.

[GARTH, C.J.—Could you not make a gift to all the persons
may from time to time form a certain committee ?]

Evans.—Not except in the case of an idol or a charity.
Tagore case shows clearly that a gift of that kind would
void. The reason why in England it is possible to give est
of the kind mentioned by the Chief Justice arises from the
that, under the doctrine of contingent uses, an estate may rem
in *gremio legis* without being absolutely vested in any deter
nate person; but this doctrine is totally unknown to the Hi
law.

[MARKBY, J.—Is there any difference between an absolute est
with a clause of defeasance on a given event, and such an est
as the respondents here contend for ?]

Evans.—There would be a very great difference. In the c
your Lordship puts, which is that of *Soorjeemoney Dasse*
Denobundoo Mullick, 9 Moore's Indian Appeals, 134, the prop
would be wholly vested in the person taking, subject to
clause of defeasance; and at the time the will took effect,
the death of the testator, the person taking by virtue of t
clause was actually ascertained and capable of taking.

[GARTH, C.J.—In this case you cannot say that at any mo
of time the property is not wholly disposed of? The whole
in one, and when another is born the whole is in those two ?]

Evans.—There would be many difficulties in the way of
explanation, my Lord. An estate left to an infant and
unborn, which might open and shut *ad infinitum* to let in
others as they should come into existence, would require t
limited in some way. Besides, we should have complete
rid of the *Tagore case*.

[MARKBY, *J.*, referred to *Bhoobun Mohini Debia* vs. *Hurish Chunder Chowdhry*, 2 C. L. R., 339.]

Evans.—Before I go on to the *Tagore case*, I wish to refer your Lordships to a case which clearly shows the necessity of vesting, namely, *Kally Prosonno Ghose* vs. *Gokul Chunder*, I. L. R., 2 Cal., 295. In the *Tagore case*, their Lordships stated their views with regard to gifts, in the first instance. [Counsel read from 9 B. L. R., pp. 395 to 400.] The conclusion at which their Lordships arrive is, "that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must, either in fact or in contemplation of law, be in existence at the death of the testator." Now, if a gift to an unborn person is void, how can it be made better by joining a living person with that unborn person? To use a living person for the purpose of feeding the uses of unborn persons is merely to bring in the doctrine of contingent uses of English law. The explanation given by the Privy Council of the case of *Denobundhoo Mullick* is totally against such a proposition of law. It is clear, then, that these unborn persons cannot be considered as donees. It is admitted that the full 16 annas has been given over to the son which was alive, but to open on the birth of new heirs. Here, then, there is property impressed with a series of incidents unknown to the law of Bengal. Such an estate is incompatible with an estate of inheritance, which is not endowed with this quality of opening and shutting, but when once divested it descends to the heir.

[Counsel read 9 B. L. R., 401-2.] Trusts estates are, therefore, in the judgment of the Privy Council, recognized in Hindu law, but they cannot be created for beneficiaries to whom the property could not be given directly. Now, is not that the present case? Is it not an attempt to give a benefit to an unborn person? The *Tagore case* also shows why a law against perpetuities is unnecessary in Hindu law, namely, on account of the character of the Hindu law of gifts. But if the contention of the other side is to be upheld, the law would be as necessary here as in England, as the property might be tied up for the next fifty years. I shall now put to your Lordships the consideration whether it is not really a gift to a class. In *Jarman on Wills*, vol. 1,

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p. 243, it is laid down that the question, whether a gift is one to a class, "depends upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take equally, the share of each being dependent for its amount upon the ultimate number of persons;" and that precisely covers the present case. *Porter* vs. *Fox*, 6 Simon, 485, is very like this case in some respects, and it shows that in no case will a gift to a class be turned into a gift to an individual. There is no ground on the authorities for saying *Soudamoney's case* should be questioned. In No. 554 of 1876—*Ramloll Mullick* vs. *Buleram Mundul*—the same point came up, and *Soudamoney's case* was followed by MACPHERSON and KENNEDY, *J.J.*

I now come to the point of limitation. The first question is,—Is there a trust? and the whole scope of the will shows that there is here a trust. *Burdick* vs. *Garrick*, L. R., 5 Ch., 233, shows there needs no such thing as a legal estate to constitute a trust, and in *Edwards* vs. *Warden*, 1 App. cas. 281, it is laid down that where a person gets property to manage and hold for the benefit of another, he is a trustee. This brings us clearly within the 10th section of Act IX of 1871. Vesting in that section means nothing more than clothed with the power of dealing with the property. It cannot mean that the trustee should have an estate in him, for in Hindu law which recognizes trusts there is but one estate, that of the beneficiary. A trustee under the 10th section must mean, then, a person who has a right to take the possession of property, and to manage that property, not for his own benefit but for that of others. The defendant is therefore a trustee; and where on the face of a deed of trust a resulting trust appears, it is an express trust, and against the donor or his heirs the trustee cannot plead limitation. The precise point was decided in *Salter* vs. *Cavanagh*, 1 Dr. & W., 668. That case shows that where you give in trust an estate of which the whole beneficial interest is not exhausted, the portion remaining undisposed of will be held on an express trust. There is no question of legal or equitable estate. The rule is, that where a man holds under a document which completely negatives any idea that

he holds for himself, the law says that such a man will not be allowed to take advantage of non-claim on the part of the beneficial owner. When an express trust is made, the law writes in the deed that, if the trust fails in whole or in part, or does not exhaust the beneficial interest, then the trustee shall hold, as on an express trust, for the resulting *cestui que trust*. This is clearly English law, and the 10th section only expresses the English law on the subject.

The following judgments were delivered by the Court (1):

MARKBY, *J.*:—

The following facts are stated in the plaint filed in this suit. On the 28th of January 1860, one Gopaul Lall Bysack executed a will, whereby he gave to his mother, the defendant Doorgamoney, Rs. 5,000 Company's paper for the performance of religious acts and pilgrimages, with power to sell the same, if necessary. Then he gives Rs. 5,000 to his wife, the plaintiff, Kherodemoney Dossee, for her maintenance and the performance of certain religious duties, and directs that she is to draw the interest in her own name, but she is to have no power to expend the principal. He also directs his wife to live in that portion of the family dwelling-house which he occupied, and to perform the religious acts with the concurrence of the defendant, Doorgamoney. He gives to his sister, Doorgamoney Dossee, Rs. 2,000, and to his sister's daughter, Kadumbenee, Rs. 500; and having thus provided for the females of his family, and having no son of his own, he directs that "whatever ready money and Company's papers will remain after deduction of the abovementioned legacies, and the family dwelling-house, tenantable land, wearing apparel, &c., whatever there are, the same I give in equal shares to the son lately born to my sister's husband, Sreejoot Woodoy Chund Mullick, and to the son (or sons) that may hereafter be born (to him); when all of them will attain majority you will divide (the property) amongst them; at present you remain (are) the *kurta* (sole manager); you will support the said son, and others and my wife, (*i.e.*,) all of them, with the amount of rent and interest on the Company's papers, and you will sell Company's papers if required in giving those sons in marriage or performing *koola karma*, *i.e.*, the customary ceremonies of the family." Then fol-

(1) GARTH, *C.J.*, and MARKBY, *J.*

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lows a clause which is not very intelligible, but which seems the purpose of the present decision, immaterial, and the says :—" You will pay my debts and get in the dues (moneys ceivable to me) for the management of the above business. my own accord, appoint you my attorney, that is, executrix ; will manage the business after asking (*i.e.*, taking the opinion Sree Kulla Chand Bysack, my elder brother, (or cousin) Mohas and Sreejoot Woodoy Chund Mullick Baboo, and having my library, that is books, &c., whatever there are, you will that money (the proceeds of that sale) to the estate." Then lows a gift of Rs. 1,000 to his wife in lieu of certain jewel which had been promised to her at her marriage.

The testator died on the 4th of February 1860, and the defend Doorgamoney, having proved the will, took possession of the tator's property. At the time of the testator's death, his si and her husband Woodoy Chund Mullick had one son only, died in 1869 or 1870, an infant unmarried. After the testat death two other sons were born, one of whom died in 1867 or 1 unmarried ; the other is the present defendant, Judoololl Mull The testator is alleged to have died possessed of Rs. 25,000 C pany's papers, two dwelling-houses, and moveable property about Rs. 2,500 value.

On the 18th of August 1865, the plaintiff instituted a against the defendant, Doorgamoney Dossee, for the recover certain jewellery and furniture ; for a declaration that she was titled to reside in the family house ; for her maintenance ; for 1,000 in lieu of jewellery given to her by her husband's will ; the Company's papers for Rs. 5,000 also given to her by the and for Rs. 19-4-8, which she had expended on her husba *shraddh*. The decree in that suit, dated the 8th of March 1 directed that the plaintiff was entitled to reside in the family ho to have the Rs. 1,000 paid to her ; to have the Rs. 5,000 Compa papers brought into Court, and to have the interest thereof to her. The plaintiff, however, says that she has nevertheles been allowed to reside in the family house.

The plaintiff in the present suit further submits, that the position in favour of the sons of the testator's sister and her band Woodoy are void under the Hindoo law, and she accor

ly asks to be let into possession of the dwelling-house, and of the other property belonging to the plaintiff forming his residuary estate, and for an account.

It is not necessary to notice the written statements, as when the case came on for settlement of issues, the learned Judge in the Court below held, first, that the whole suit was barred by limitation; and, secondly, that it was barred by the decree in the previous suit.

The plaintiffs have appealed, and in the appeal they deny that their suit is barred on either ground. The defendants, on the other hand, contend that, even if the suit be not barred, as held by the learned Judge below, the plaint ought to be dismissed, so far as it seeks to recover possession of the testator's property upon failure of the gift to his sister's sons; for, as they contend, that was in law a good and valid gift.

With regard to the question, whether the plaintiff's suit is barred by limitation, that depends upon Act IX of 1871, which contains the law applicable to this case. It seems to me that the best way of considering this case, is to see what articles of the schedule to that Act would provide for this case if it were an ordinary case, and then to see whether there are any special provisions which take the present case out of the ordinary rule.

In order to see what articles of the Limitation Act the case falls under, we must see what the plaintiff's cause of action is, and when it accrued. The suit is brought by a Hindoo widow for possession of the immoveable and moveable property of her deceased husband, who died childless; and she was entitled, as her husband's widow, to take possession of his estate on his death, except so far as his will may have given the right of possession to any other person. Now, as regards the immoveable property, I do not think that, if the gift to the testator's nephews be void, there is in the will any disposition of the immoveable property at all. I read the clause, which directs the defendant Doorgamoney, out of the rents and interest to support his nephews, as dependent on the clause disposing of the *corpus*, which preceded it, so that if one falls the other falls also. The allusion by the testator to his wife's maintenance in this clause is evidently a mistake, and that provision of the will is superfluous, as her maintenance had already

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been provided for in another way. As to the immoveable property, therefore, if the gift to the sons of Woodoy be void, the plaintiff was entitled to immediate possession on the death of her husband, and the cause of action arose at that date.

As to the moveable property, it was no doubt necessary for the defendant Doorgamoney to take possession of it, and to retain it so long as was reasonably necessary in order to wind up the affairs of the estate. As to that portion of the property, therefore, no right of suit accrued immediately, but this present suit was not brought till seventeen years after the testator's death, and the plaintiff does not allege that there were any debts, or any difficulty in getting in the estate, and, therefore, I think we may assume on the plaintiff's own allegations that her right to possession of the moveable property also accrued more than twelve years before this suit was brought. This being so, the case as to the moveable property must fall either under Article 118 or Article 122, and in either view it is barred, unless there is something to take this case out of the ordinary rule.

The case as to the immoveable property falls under Sch. II, Art. 145; the twelve years therefore began to run when the possession became "adverse" to the plaintiff. In my opinion, the possession of the defendant was adverse to the plaintiff from the testator's death. By possession adverse to the plaintiff, I understand to be meant possession of that which the plaintiff is entitled to possess, held, not on behalf of the plaintiff, but on behalf of some other person. The defendant Doorgamoney held the property and never held it on behalf of the plaintiff. Doorgamoney's possession, therefore, was adverse to the plaintiff throughout.

Then does the case fall under any special provision which renders these, which are the ordinary rules, inapplicable? The plaintiff says that the bar of limitation which these rules create is excluded by section 10. That section provides that, "notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives, for the purpose of following in his or their hands such property, shall be barred by the length of time." The defendants, on the other hand, con-

this section has no application to the present case; they
e, first, that this property was never vested in Doorgamoney
l; and, secondly, that, if vested in her, it was not vested in
a trust for any specific purpose.

ith regard to the first contention, there is no doubt that the
"vest" is not an appropriate one to describe the position of
ndu executor in a will made prior to the Wills' Act. It has
frequently held that the mere appointment of a person as
itor to a Hindu does not cause any property to vest in him
; and that, if, as executor, he is entitled to hold the property,
olds only as manager. And ordinary persons who are called
ees do not, under Hindu law, become the owners of the
erty which is placed in their charge. Possibly, however, as
is an Act which contains the law of limitation for all classes
rsons, the word "vest" may be used when speaking of a
n standing in a fiduciary relation, not in the sense of
ned," but in the sense of "held in possession." At any
I am not prepared to say that, had the gift to the sons of
loy been vested, the residue of the testator's property would
ave been "vested" in the defendant, Doorgamoney, within
meaning of the word "vested," as used in section 10 of the

t the question still remains, whether, under the circumstances
the plaintiff sets forth, the property was held by the defend-
Doorgamoney in trust for any specific purpose. It was
y made over to her, in the first instance, for a specific pur-
i.e., to apply the profits in a certain way and then to divide
rpus amongst the sons of Woodoy, but that specific pur-
s one which the plaintiff herself alleges to have failed,
e it was one for which a Hindu could not devise his pro-
This specific object having failed, Doorgamoney was
to hand over the property to the testator's legal heirs.
bound to do this, did she then hold it in trust for a "specific
" within the meaning of the Act?

is had been an English case, the property would have
vested in Doorgamoney, and, there being a clear inten-
t she should not take it for her own benefit, there would
n what is called a resulting trust for the heirs of the

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testator for whom, therefore, the executor would be a
But in a Hindu will before the Hindu Wills' Act ther
appears to me, no room and no necessity for the doctrine
ing trusts, which arises out of the conflict between equi
legal estates. The Hindu executor takes no estate, bu
power of management; and, upon the special purpose f
the executor is to hold the property failing, the proper
posed of vests at once in the heirs who can sue for
therefore, Doorgamoney was a trustee for the legal hei
it must be upon some doctrine other than that of
trusts.

The relation between the defendant Doorgamoney
heirs was undoubtedly a fiduciary one, and, therefore, ir
general sense of the word she might be called a trustee
do not think the 10th section of the Act was intended to
all fiduciary relations whatsoever. The position of agents
and managers and *benameedars* may be, and generally is, a
one; but agents and factors are specially provided for
parts of the Act, and *benameedars* are expressly declar
be trustees.

But even if Doorgamoney could in any sense be called
of the residue of the plaintiff's property for the legal
still think she was not a trustee for a specific purpos
the meaning of the Act. In one sense, of course, sh
Every trustee must be a trustee for a specific purpose in
that a purpose can be indicated to which the property
the trustee must be applied by him; but I think tl
"specific purpose" were intended as words of restrict
the conclusion I have come to is, that by "specific
must be meant a purpose which has been specified by th
who created the trust. I am not prepared to say that
"specific" in the Indian Act of limitations correspond
to the word "express" in the English Act. Express trust
besides direct trusts, implied trusts, and resulting trusts,
constructive trusts, using those words as defined by Mr.
p. 86 of the 5th edition, in the notes. That language
classification of trusts is, however, scarcely applicable i
try where by the word "trusts" we indicate relationshi

ing from that of trustee and *cestui que trust* under the English law, and where such relationships may be created by parol. It may, I think, well be that the Indian Legislature did not think it desirable, after a certain lapse of time, to enforce trusts which had to be gathered from the tenor of a conversation, and had not been declared by any specific words. The trust which it is now sought to enforce had not been specified by the testator, and I, therefore, think that section 10 does not apply to this case, and that the ordinary rules of limitations must apply.

This is sufficient to dispose of the whole suit, except as regards the right of the plaintiff to live in the family dwelling-house. But she has already sued once for that right and had it established. She cannot sue on that cause of action again.

In this view of the case, it is not strictly necessary to consider the other question which has been argued, namely, as to the validity of the disposition by the testator in favour of the sons of his sister's husband. I am obliged, however, to express my opinion upon a similar clause in another case, and so I think it is better to do so in this. I wish to say at once that I entirely agree in the general propositions laid down by the learned Judge below, that, if there be a gift to a class some members of which cannot legally take, the whole gift is void. The principles upon which this rule is based, as explained in *Leake* vs. *Robinson*, 2 Meriv. 364, and the text books and other decisions in which that case is commented upon, are broad principles of construction which are, in my opinion, applicable to the wills of all persons alike.

The doubt I have had is, whether any defect can be imputed to the gift in this case. It is undoubtedly a gift to a class, but is it a gift to a class some members of which cannot legally take?

It is said, that inasmuch as the gift includes persons not in existence at the death of the testator, the gifts as to those persons is void, upon the principle laid down in *Tagore* vs. *Tagore*, 9 B. L. R., 377. The Privy Council there say of the Hindu Law as to gifts *inter vivos*, that it applies to all persons in existence, and capable of taking from the donor at the time when the gift is to take effect so as to fall within the principle expressed in the

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Dyabhaga, ch. 1, v. 21. They then say of wills, that they form of gifts, and that a will "is a continuous act of gift t the moment of death, and does then operate to give the pro disposed of to the persons designated as beneficiares. They upon the death of the testat or as they would if he had give property to them in his life time. There is no law expressl in terms applicable to persons who can so take. The law of has, however, grown up, so to speak, naturally from a law furnishes no analogy but that of gifts, and it is the duty tribunal, dealing with a case new in the instance, to be gov by the established principles and the analogies which have tofore prevailed in like cases." Further on they say, "the logous law in this case is to be found in that applicable to and even if wills were not universally to be regarded respects as gifts to take effect upon death, they are genera to be regarded as to the property which they can transfer the persons to whom it can be transferred;" and then they clude "that a person capable of taking under a will must be a person as could take a gift *inter vivos*, and, therefore, either in fact or in contemplation of law, be in existence death of the testator.

From this it appears that wills and gifts are not identica only analogous, and of course there is considerable diffic saying how far the analogy extends. In this same case the Council say, that it does not apply where the donee is an a son, nor where the donee is a *fœtus* in the womb. The Council also seem to think it may not apply in some c provisions by way of contract or of conditional gift on ma or other family provision.

The Privy Council also recognize the propriety of the d in the earlier case of *Soorjeemoney Dassee* vs. *Deno B Mullick*, 9 Moore's Ind. App. 123. In that case ther a devise of property to several sons with a proviso that, if of the sons died without issue, leaving a son or sons living death, neither his widow nor daughter should get his shar the property should go over "to such of my sons and m *son* (probably meaning *son's sons*) as shall then be This was held to be a valid devise.

In a later case not yet reported (1) (*Bhoobun Mohiny Dabee* vs. *Hurish Chunder Chowdry*) a gift was made *inter vivos* which had to be construed by the Privy Council. Upon a construction of the whole document it was held to be an absolute gift to a woman and her heirs, defeasible in the event of a failure of issue living at the time of her death, in which event the property was to revert to the heirs of the donor. The contest in the case was, as to whether the estate given the donee was an absolute one or not, but it was unnecessary for the Privy Council to consider the validity of the executory limitation in favour of the donor and his heirs, because they put that construction on the deed, and they say, "that there is nothing in such a condition repugnant to Hindu law appears from the decision of this tribunal as to an executory devise in the case of *Soorjeemoney Dassee* vs. *Deno Bundhu Mullick*, (9 Moore's Ind. App. 123,) as explained in the *Tagore case*."

The way in which the case of *Soorjeemoney Dassee* vs. *Deno Bundhu Mullick* was explained in the *Tagore case* was as follows: It was observed that the question in *Soorjeemoney Dassee* vs. *Deno Bundhu Mullick* "was not as to the effect of a gift to a person not in existence, but whether a person in existence, and capable of taking under the will when it had effect, might become entitled upon a future contingency to receive an additional benefit. The testator devised an estate to several sons, with a proviso that if either of such sons died without having a son or son's son living at his death, neither his widow nor daughter should get his share, but that the same should go over to the other sons. Their Lordships held the gift over to be valid. The point in question, therefore, was not raised, and could not have been decided as supposed." It is observable that in these observations it is not noticed that, in the case of *Soorjeemoney Dassee* vs. *Deno Bundhu Mullick*, the gift over was to the *son's sons* as well as to the sons. But it is impossible to suppose that these words were overlooked by their Lordships.

These are the only cases in the Privy Council upon the point, and it is no doubt possible to argue, that where there is a gift to a class, the exigencies of the Hindu law as to testamentary

(1) Reported in 2 C. L. R., 339.

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bequests are sufficiently satisfied, if some individuals of the class are alive at the time of the testator's death, who can be the immediate recipients of the bequest. The estate would then open out for each fresh member of the class as occasion arose; and an estate of this nature would not be wholly without analogy in the Hindu law. This is, in fact, the ordinary condition of a Mitakshara family, at any rate in Madras and Bombay, where the family is certainly no longer the corporate owner, and each member at his birth takes in his own proper person some sort of joint-interest in the family property.

But nothing of this kind seems to have been contemplated by the Privy Council. They seem to have considered the cases of *Soorjeemoney Dassee* vs. *Deno Bundhu Mullick*, and *Bhoobun Mohiny Dabee* vs. *Hurish Chunder Chowdhry*, as forming no exception to, or extension of, the rule laid down in *Tagore* vs. *Tagore*.

On the other hand, there are two cases in this Court which, perhaps, I cannot, sitting here, treat as binding authorities, but from which I should be very unwilling to differ. In *Soudamoney Dassee* vs. *Jogesh Chunder Dutt*, Ind. L. R. 2 Cal., 262, the testator directed that his property should be divided into five parts, four of which were to be enjoyed by four out of his five sons for life, and the remaining share by his two grandsons (sons of a deceased son) for life. The testator then directed, that on the death of any of his sons or grandsons leaving male issue such male issue should succeed to the share of his deceased father on attaining the age of 21 years. There were also devises over which it is not necessary to notice. PONTIFEX, *J.*, held, that the gift to the male issue of the sons or grandsons was void, inasmuch as there might be male issue born after the testator's decease.

It was also admitted at the bar, that in a subsequent case (*Mullick* vs. *Mullick*, No. 554 of 1876) heard before MACPHERSON and KENNEDY, *J.J.*, on the Original side, but of which I am not able to obtain any report, the view taken by PONTIFEX, *J.*, was adopted.

It was not contended that the devise now under consideration could be held to be valid without overruling these two decisions

and I have reason to believe that in other cases also these decisions have been followed.

Upon the best consideration I have been able to give to the present case, I do not think the decisions I have referred to in the Privy Council govern this case, and if I am unfettered by authority, I have then no difficulty in agreeing with the decisions of this Court. I think that, so far from seeking methods of extending the testamentary powers of Hindus, we ought to do everything we legally can to restrain them. I believe the testamentary law of England to be wholly unsuited to the wants and habits of the people of this country, and I think it wise to apply the rule laid down in *Tagore* vs. *Tagore* strictly. I, therefore, hold that the bequest now under consideration is a bequest to a class some members of whom could not legally take, because they were not in being at the testator's death, and that for this reason the bequest is wholly void.

GARTH, *C.J.*:—

During the argument of this case, I confess I entertained some doubt upon both the questions involved in it, but after hearing a very able argument, for which I desire to thank the learned counsel on both sides, I have arrived at the same result as my learned brother, upon the following short grounds.

Upon the authority of the *Tagore case*, 9 B. L. R., 377, and the decisions in this Court which have been already referred to, I consider that the limitation in favour of the sons of the testator's sister and her husband are void. I had some doubt, at one time, whether Mr. Hill's argument, founded on the rule laid down by Hawkins on Wills, page 71, was not well founded, viz., that where a devise was made to a class, and some one or more of that class were living and capable of taking at the death of the testator, there was no reason why the devise should not take effect in favour of the person or persons so capable of taking, and then open out afterwards to let in any more of the class who might be subsequently born. But the able argument of Mr. Evans satisfied me that this view is not consistent with Indian law. In England, the rule against perpetuities prevents the law contended for by Mr. Hill from producing any incon-

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venient results. But in this country there is no rule : perpetuities, and we have no right to introduce one; and were to hold that the law for which Mr. Hill contend: plicable in such a case as this, it would be applicable also the class did not consist of sons only, but of grandsons, and grandsons, who might not be born for fifty or a hundred after the testator's death. I think, therefore, that the ru in the *Tagore case* applies here, and that the limitation testator's sister's sons is void.

The plaintiff then, as the testator's widow, would be e to recover the property claimed, if she is not barred by tl of limitation. *Primâ facie,* she would certainly be so barr cause her title to it accrued upon the death of her husban the defendant has been in possession of it on behalf of tl sons for whom she has been acting as trustee for mor twelve years. But then, Mr. Phillips contended th: property had become vested in the defendant "as a for a specific purpose," within the meaning of sect of the Limitation Act of 1871, and, consequently, that th which is brought to follow up such property in the defer hands, is not barred. He contended that, although the obj which the trust was created may have failed, the defendant be considered as holding the trust property for the testator': heirs, and, consequently, that the plaintiff is entitled to the fit of section 10.

Now, I should wish to give to section 10 as large a co tion as the language of it reasonably allows. I could have v in an equitable point of view, that the scope of that secti been considerably extended, but we are of course tied dc the words of the section, and are bound to see what thei meaning is. I think, after much consideration, that wha mean is this: That where a trust has been created expres some specific purpose or object, and property has become in a trustee upon such trust, (either from such person havin originally named as trustee, or having become so subseq by operation of law,) the person or persons who for the tim may be beneficially interested in that trust may bring against such trustee to enforce that trust at any distance

without being barred by the law of limitation. It seems to me that the language of the section is specially framed so as to exclude implied trusts, or such trusts as the law would infer merely from the existence of particular facts, or fiduciary relations.

That being the construction which I put upon section 10, I consider that this case does not come within its scope. The specific purpose for which the defendant became a trustee under her son's will was to carry out and protect the disposition of the property in favour of the testator's sister's sons. If that disposition had been a valid one, the persons beneficially interested in the trust might have sued the defendant, or any other person in whom the property had become vested as trustee, to enforce the purposes or objects of the trust, at any distance of time. But the plaintiff's object is the very opposite of this. She is suing for the purpose of invalidating the disposition in furtherance of which the trust was created. Her object is to defeat that trust, not to enforce it. Her interests are directly adverse to those which the trust was designed to protect, and the defendant has been holding the property adversely to her for upwards of twelve years.

I am of opinion, therefore, that the learned Judge was quite right in holding that the plaintiff's suit was barred. The defendant has stated here, through her Counsel, that she has been holding, and desires to hold, the property for the benefit of the sons of the testator's sister; and it seems to be admitted on all hands that she has been receiving the profits for them and on their behalf. The appeal will be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

1878 *August* 16*th*.

No. 12 of 1878.

RAM CHUNDER GHOSAL . . . . . PLAINTIFF,

AND

HEMANDINI DEBI . . . . . DEFENDANT.

Limitation—Joint Hindu Family—Mortgage—Possession of Mortgagee—Manager—Kurta—Demand—Repeal of Act—Injunction—Foreclosure—Act IX. of 1871, *Sch. II., Art* 149.

A member of a joint Hindu family consisting of six brothers mortgaged his share to his eldest brother, the plaintiff (who was then in possession as the *kurta* of the family), in the year 1842, for the sum of Rs. 8,000. It was covenanted that the money should be paid on demand with 12 per cent. compound interest from the date of the advance, and that if the money were not paid on demand, the mortgagee might enter into possession. In 1847, the parties entered into an arrangement for an amicable partition, and it was then agreed that certain property belonging to A should be given to the plaintiff in exchange for the money due on the mortgage, but the proceedings were dropped. In 1871 a partition suit was instituted by one of the brothers, and in 1876 a partition by metes and bounds of the family property was made, and each member put into possession of his share. Before possession of A's share (which had devolved on the defendant after the death of A's widow) was taken from the plaintiff in 1876, he made a demand for the payment of the mortgage money which was refused. He then brought a suit for the recovery of the mortgage money and for an injunction to prevent the share, which devolved on the defendant, from being taken out of his hands under the partition decree.

Held, on the facts of the case, that there was sufficient evidence of a demand having been made in 1847 to set limitation running, and that the suit was barred by limitation.

Quære, whether the repeal of Act XIV of 1859 revived a right to sue which had become barred under that Act.

Krishna Mohun Bose vs. *Okhil Monee Dossee*, I. L. R., 3 Cal., 335, cited ; Art. 149, Sch. II, Act IX of 1871, discussed.

REGULAR APPEAL from a decision passed by Mr. Justice PONTIFEX, in the Original Jurisdiction of the High Court, dismissing the plaintiff's suit with costs. The facts of the case are as follows :—

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Roop Narain Ghosal, who died in the year 1839, was at his death possessed of considerable property in Calcutta, a portion of which was subject to a mortgage in favour of a Mr. Money. He left six sons and a widow surviving. The eldest son, Ram Chunder Ghosal, took out letters of administration to his father's estate and continued in possession as *kurta* of the joint-family. In 1842, Hurrish Chunder, one of the younger sons, got into debt, and in order to pay off his creditors he applied to his eldest brother Ram Chunder for a loan, who advanced to him Rs. 3,700, and agreed to make further advances, in all not to exceed Rs. 8,000. By a bond and warrant of attorney, dated the 1st of February 1842, which recited the receipt of Rs. 3,700 and the agreement for further advances, Hurrish Chunder bound himself in the penal sum of Rs. 20,000 to pay these advances, with compound interest at the rate of 12 per cent. per annum, the condition of the bond being, that if Hurrish Chunder would on demand pay to Ram Chunder the entire amount of principal and interest due on demand made, the bond would be void; otherwise it was to continue in full force and effect. By a mortgage deed of even date with the bond and warrant of attorney, Hurrish Chunder mortgaged the sixth share of his father's estate, then in the hands of Ram Chunder as administrator, as further security for the payment of the Rs. 3,700 and further advances. The deed, which recited the bond and warrant of attorney, contained a clause, that on default of payment on demand, Ram Chunder, the mortgagee, might enter on the premises, and keep and enjoy the same without let or hindrance from Hurrish Chunder, or any person claiming under him. In April 1844, Ram Chunder made the last of these advances, the whole sum then advanced being Rs. 7,172-10-0.

In 1847, the members of the family (the six sons) commenced to make arrangements for an amicable partition, and it was agreed that the plaintiff in consideration of his mortgage should take some Bank Stock and part of a certain property called the Budge-Budge Talook, which would otherwise have fallen to the share of Hurrish Chunder. The arrangements for the partition fell through in consequence of Mohes Chunder, one of the brothers, showing signs of lunacy. Although provision was made for the

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mortgage debt being paid off on partition, the plaintiff that at any time during the negotiations he had demand money from Hurrish Chunder.

Mohes Chunder was adjudged a lunatic in 1850, and H Chunder, the mortgagor, died in 1851, leaving a widow, C moye, and a daughter, Hemandini Debi, the present def In 1859, Ram Chunder filed a suit for partition and an acc the Supreme Court against the other members of the family, the representatives of Hurrish Chunder among othe decree was given for an account, but as the taking of the ac was not proceeded with, the suit was finally dismisse mention of the mortgage by Hurrish Chunder appears in tl ceedings in that suit.

In 1871, Eshan Chunder, the youngest of the six br filed a suit for partition against the present plaintiff a other members of the joint-family, and on the 17th of 1874 a decree was passed that the six sons (or the represen of such as were dead,) were entitled each to one-sixth of t perty of the father, Roopnarain Ghosal, deceased, and dire commission to issue for the purpose of making a partition by and bounds. In the proceedings in that suit no menti pears to have been made by the present plaintiff of the m to him by Hurrish Chunder.

From 1842 to 1876 Ram Chunder had remained in pos of the joint family property as manager, but on the 13th tember 1876, the partition proceedings being almost com he made a demand on Omritomoye Debi, the widow of H Chunder, for the money advanced on the mortgage of 1872 compound interest at the rate of 12 per cent. per annum, a ing in all to Rs. 31,035-4-0. The demand not havin acceded to, Ram Chunder brought the present suit for an i tion to prevent the representatives of Hurrish Chunder from possession of their share under the partition decree, fo closure, and for an account. About the same time he br similar suit for the same relief against the committee of Chunder, (who has been a lunatic since 1850,) on a bo mortgage of precisely the same character and with the sa cumstances attending it as that of Hurrish Chunder.

after the institution of the suit against the representative of Hurrish Chunder, the partition was completed, and the defendant was put in possession of Hurrish Chunder's share, which was taken out of the hands of the plaintiff.

The defendant denied all knowledge of the mortgage, pleaded that it was a forgery, and that if it were not a forgery it had been executed under the undue influence of the plaintiff and by fraud. The case having come on for hearing, the following judgment was delivered by

PONTIFEX, *J.*:—

A good many issues have been settled in this case, but none are necessary to be dealt with, except the 1st, 5th, 6th and 7th. In respect of the 5th and 6th issues, I find that Hurrish Chunder Ghosal did execute the mortgage, and that he did not execute it under undue influence. With respect to the 7th issue, I have considerable doubt whether the evidence adduced is sufficient to satisfy the Court that the plaintiff had separate funds at his command, large enough to enable him to advance the amounts alleged to have been paid in respect of both Hurrish Chunder's and Mohes Chunder's mortgages, and to make the purchases of the other property the plaintiff still possesses; but it is not necessary in my opinion to decide that, because on the first issue I consider the plaintiff long since barred by limitation, and that his possession has been the possession of a trustee, and not of a mortgagee. From 1842 up to the institution of this suit the plaintiff has not paid himself a pice for principal or interest, and has made no demand whatever, but has paid the entire fruits of Hurrish Chunder's share to Hurrish Chunder and his representatives; and nothing has been done since 1847 by the plaintiff to keep the mortgage alive. No demand has been made for payment of principal or interest between 1846 and 1876, when the first written demand was made for 3¼ lakhs of rupees in respect of principal and accumulations of interest on a mortgage executed in 1842 for an advance of less than Rs. 8,000. What makes it more remarkable that no previous demand or mention was made in respect of the mortgage is, that in 1851 Hurrish Chunder died and his widow succeeded. No demand was made on her, though

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more than the whole of her late husband's share had, if the mortgage then existed, been consumed, but the whole fruits of that share have been paid to her. Even if the express law of limitation does not apply, (although I think it does apply,) I think it would be the duty of the Court to refuse a stale demand like this, which is not brought forward till every one who could dispute it is dead. The plaintiff's claim must be refused with costs.

The plaintiff appealed.

Paul, (Advocate-General,) and *Evans*, for the Appellants.

Paul.—The suit is clearly in time. No limitation ran until default, and there was no default, until the demand was made in 1876. We were then, as we had been from 1842, in possession, for the foreclosure decree of itself did not change the nature of the property; it still remained joint—*Prawnkissen Mitter* vs. *Sreemutty Ramsoonderry Dossee*, Fulton, 110. The question of laches does not touch our case. So long as we are strictly within the law laches cannot affect us—*Mankee Koer* vs. *Sheikh Mannoo*, 14 B. L. R., 315. We are clearly entitled to an account; of course, we fail, if on taking the account it appears that we have received more than the amount of mortgage-money and interest.

Evans, on the same side.—The learned Judge was clearly wrong on the point of limitation; he does not seem to be quite sure of his ground in this respect. He also says, that we are barred by laches, but that point is settled by the case in 14 B. L. R., 315. We come before the Court as parties in possession of property over which we have a lien, and we ask the Court to prevent the defendant from taking the property out of our hands without paying the money which he owes us. It does not matter how we came into possession. Suppose we were in it first as trustee. The *cestui que trust* assigned it over to us, and it cannot be that he will be allowed to take the property out of our hands without paying our debt, or to plead limitation—*Wynne* vs. *Stein*, 2 Phillips, 308.

[GARTH, *C.J.*—The question is, holding as manager, can you, without any notice to the mortgagor, claim to hold as mortgagee?]

Evans.—Supposing there was anything inconsistent in holding both as manager and mortgagee, I say we made a demand,

and before we were turned out of possession we filed our plaint claiming as mortgagee. But there is nothing inconsistent in holding possession both as manager and mortgagee. When an attorney keeps a document, you don't ask him when he changed his possession as agent into possession as lienee. If I put securities of mine in my banker's hands, he holds them in trust for me, his possession is mine, but if I give him a letter of hypothecation, he can retain them as against me. So now, plaintiff's position was at first that of a trustee, and the mortgage is equivalent to a letter of hypothecation under which he can hold possession. It may be that we cannot now get the injunction which we pray for, as we have been turned out of possession by the defendants, but we are entitled to a decree for possession, and a declaration of our lien. With that declaration we should be able to recover possession of that which has been wrongfully taken from us; without it, we should be placed in the position of parties out of possession, and laches might affect us in that case. —Fry on Specific Performance, 822.

Phillips and *Bonnerjee* for the Respondents.

Phillips.—The question is, in what capacity was the plaintiff in possession. If he was not in as mortgagee, he is barred by limitation under cl. 12, section 1, Act XIV of 1859, for their cause of action arose at the date of the execution of the mortgage. No demand was necessary to set limitation running; otherwise it must be held that the mortgagee would have an unlimited time to come into Court; but even if a demand were necessary, here judgment was entered up, and that is always sufficient demand for payment on a bond.

[GARTH, *C.J.*—Judgment was entered up for the penal sum. That was no demand of money due under the mortgage deed. Is not a demand necessary in every case, except that of a simple promise to pay—*Carter* vs. *Ring*, 8 Campbell, 459; *Gibbs* vs. *Southam*, 5 B. and Ad., 911?]

Phillips.—The proceedings for the liquidation of this mortgage at the time of the partition in 1847 are sufficient evidence of a demand having been made, and the Court on that evidence will presume it in this case. It is now admitted that this is a suit

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for foreclosure, *i.e.*, a suit for land within the meanin XIV of 1859, section 3 of which shows that where no specified, limitation will run from the date of the mortg demand is required to set the statute running—*Royl Lightfoot*, 8 M. and W., 553; *Vencataramanier* vs. *Manch* 7 Mad. H. C. R., 298. The parties here are Hindus, Hindu law no demand is necessary—*Colebrooke's Diges* chap. 5, section 166, pl. 2; nor can the amount of inte coverable exceed the principal.

Bonnerjee, on the same side.—The mortgage money was able at once, and therefore limitation ran from the dat advance—*Jackson* vs. *Ogg*, 1 Johnson, 397; *Nocoor Chun* vs. *Kally Coomar Ghose*, I. L. R., 1 Cal., 328; and th barred, for plaintiff was in possession as agent and not a gagee—*Williams* vs. *Pott*, L. R., 12 Eq., 149. At any r three years' interest can be recovered—*Steads' Mortgage* 2 Ch. D., 713.

Evans, in reply.—A mortgagee would not be allowed advantage of his refusal or delay in making a demand—*I Mortgages*, vol. 2, p. 735; the objection that the mortgag take his own time to make a demand therefore loses i *Williams* vs. *Pott* decides nothing more than that an agen hold adversely to his principal. It would be differ the property been mortgaged to the agent. As to the n of a demand, see *Leake on Contracts*, 2nd Ed., 642-3.

It is said that we are barred by the provisions of Act 1859, but we are not concerned with that Act, as this governed by Act IX of 1871. The repeal of Act XI away any effect which it might have had in barring our s set us free. There is nothing in the contention that a s barred cannot be revived by the repeal of the Act. Limitation are mere rules of procedure—*Ruckmaboye* v *Chund*, 5 Moore's Ind. App., 234; *Huber.* vs. *Steiner.* effect is merely to close the doors of the Court agai suitor after a certain time; repeal the Act, and you the Courts again to every person who has a legal right Except, then, Act XIV totally extinguished the rig not merely barred the remedy, we are free to bring our su

ts repeal, subject, of course, to the Limitation Act now in force. In *Nadhavbhai Shinbhai* vs. *Fattesing Nathubhai*, 10 Bom. H. C. R., 487, it was held that a debt barred under Act XIV of 1859 can be sued for after the repeal of that Act, and is governed by the provisions of Act IX of 1871, the very point now contended for. In *The Administrator-General* vs. *Hawkins*, I. L. R., 1 Madras, 267, it was held that the Administrator-General of Madras is authorized to pay a barred debt. Neither of these cases can be supported, unless on the ground that Act XIV of 1859 merely bars the remedy and does not extinguish the right.

[MARKBY, *J.*—Referred to the case of *Gunga Gobind Mundul* vs. *The Collector of 24-Pergunnahs*, 11 Moore, 345; 7 W. R., 12 P. C.]

Evans.—That case merely decides that, if a lessee neglects to bring a suit against his neighbour for a disputed piece of land until his claims have become barred by limitation, he cannot better his position by dragging in his landlord as a co-plaintiff. The case was never intended to decide that Act XIV of 1859 extinguished the right; if it were, the Privy Council would not, in *Maharana Fattehsangi Jaswatsanghi* vs. *Dessai Kallianraiji Kekoostraiji*, L. R., 1 Ind. App., 35, 51, 54, have expressly declined to give a decision on the point. In *Finch* vs. *Finch*, 45 Law Jour. Ch., 816, it was expressly decided that Act XIV of 1859 only bars the remedy; if it had been considered as barring the right, effect would have been given to it—*Harris* vs. *Quine*, L. R., 4 Q. B., 653. The Act was drawn up on the principle of the English Acts, and it is laid down in *Westlake's International Law*, and in *Phillimore's International Law*, vol. 4, that in the English Law Statutes of limitation merely bar the remedy. See also *Sugden's Vendors and Purchasers*, 10th ed., vol. II., p. 318; and *Pollock on Contracts*, 2nd ed., 570, *et seq.*

[MARKBY, *J.*, referred to *Krishna Mohun Bose* vs. *Okhilmonee Bose*, I. L. R., 3 Cal., 335, a case in which the point under discussion had been decided by himself and Mr. Justice PRINSEP adversely to Mr. Evans's contention.]

GARTH, *C.J.*—Section 60 of the Contract Act is strongly in your favour, Mr. Evans. But supposing you were to persuade us that you are right in your contention, I can do nothing. My

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brother MARKBY adheres to his former decision, and I alone cannot refer the point to a Full Bench.]

Evans.—I shall now go on to the question of demand. The covenant is to pay on demand, and on default the mortgagee may enter. That cannot be construed to be an idle formality. Ram Chunder could not enter before demand. A demand is always necessary, because the condition of the bond is not broken until demand. [Counsel went on to contend that the transaction was a real one, and that there was no evidence of a demand having been made.]

The following judgments were delivered by the Court (1) :—

GARTH, *C.J.*

GARTH, *C.J.* :—

This case comes before us under circumstances which naturally give rise to much suspicion and distrust, and which should induce us, in my opinion, to make every reasonable presumption in the defendants' favour.

It is brought by the managing member of a Hindu family, to enforce a mortgage said to have been made to him by one of his brothers, Hurrish Chunder Ghosal, so far back as the 1st of February 1842 more than thirty-six years ago. The original consideration for this mortgage having been (according to the plaintiff's own story) less than Rs. 8,000, his present claim upon it, with compound interest, is about three lakhs and ten thousand. It is brought at a time when the brother, who is said to have made the mortgage, is dead, when his widow is dead, and when in fact no evidence remains of the real nature of the transaction, except that of the plaintiff himself; and the lady against whom the suit is brought, is a daughter of the alleged mortgagor, who had never even heard of this mortgage, and against whom no claim was ever made, until a partition of the family property took place about three years ago, when the plaintiff, who had been in possession of the whole property for forty years, as the elder brother and *kurta* of the family, was about to be dispossessed of it under that partition, and was called upon by the other members of the family to render an account of his

(1) GARTH, *C.J.*, and MARKBY, *J.*

receipts. During all this time, whilst this enormous debt was in process of accumulation on compound interest, the plaintiff was receiving his brother's one-sixth share of the profits of the property, and making that brother an allowance for his maintenance. No one knows, or can know, except himself, whether, assuming the mortgage to have been a *bonâ fide* transaction, he has re-paid himself any, and if so, what part of the mortgage money; and, according to the plaintiff's own account, no demand of the money has ever been made, and he has been holding this terrible engine over the heads of his brother's family, until it should answer his own purpose to put it in force again. It is a most extraordinary circumstance, and we think it is scarcely possible to believe that the plaintiff kept no books of account in which this or any of his private transactions was entered. It is well known that every Hindu, of any education, who engages in business matters on his own account, keeps books. The plaintiff professed to keep regular accounts of the joint-family property. He says that he was a saving man, and had several properties and money transactions of his own, and yet he produces no books, and states that he never had any.

This is just the sort of case, in my opinion, which courts of justice should approach with the greatest caution, the proof of which they should watch with the utmost strictness; and in which, as I said before, every fair and reasonable presumption should be made in favour of the defendant. Approaching it, however, in this way, I can see no good reason to doubt the fact of the execution of the deed by the mortgagor, or the receipt by him of the original mortgage money.

Whether the money so lent belonged to the plaintiff himself, or to the joint-family, or whether the mortgage itself may have been only a contrivance for protecting the mortgagor's property from the hands of creditors, appear to me questions on which, in the absence of any evidence, it is impossible for us to form any reliable opinion. If the plaintiff's story is to be believed, the money was lent out of his own earnings; and the fact that Rs. 700, which was lent to the mortgagor out of the joint property, appears to have been re-paid to the joint funds, and that this mortgage money was not, affords some reason for

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GARTH, C.J.

believing that the money was the plaintiff's private prope
But, assuming this to be so, the first question which arises is
what time by the terms of the mortgage deed, the money bec
payable? Are the words "on demand" a mere formula, mea
that the money was re-payable at once, as in the case of a
missory note payable on demand (*Rumball* vs. *Ball*, 10 Mod. R
38),—or do they mean that the money was not to be payable,
the remedies to recover it put in force, until after an ac
demand, as in the case of a bond payable on demand?
Carter vs. *Ring*, 3 Camp., 459).

The learned Judge in the Court below seems to have co
dered that the loan became payable at once, and that the
was barred by limitation; and that, even if this were not so,
laches of the plaintiff was quite sufficient to debar him in eq
from any remedy. After hearing the case very fully and
argued, I confess I cannot take this view. I have, after consi
able hesitation, arrived at the same conclusion as the lear
Judge, but upon a different ground altogether. It was conten
on appeal by the plaintiff:—

First.—That the mortgage money was not due until a dem
was made, and that no demand was made until the 13th of S
tember 1876.

Secondly.—That if the money were, by the terms of the bo
payable *in presenti*, the Limitation Act applicable to the case wo
be the Act of 1871, which allows a mortgagee sixty years wit
which to sue for foreclosure.

The respondents contend on the other hand: *First.*—That
mortgage debt became payable at once. *Secondly.*—That the d
became not only barred, but extinguished, by force of the Li
tation Act of 1859, and was not revived upon the repeal of t
Act by the Act of 1871.

Upon the first of these points I have had great doubt;
if the words "on demand" had been used only in the pro
for redemption, and in the covenant to pay the mortgage mo
I should have been disposed to hold that the debt became
at once. The money advanced prior to the mortgage is ackn
ledged in the deed itself to be then due and payable; and
fact, that compound interest was to go on accumulating upon

sums advanced, seems quite inconsistent with their not being then due. One test, which was very properly relied upon by the respondent as showing that the money became due at once, was that, if it were not due, the mortgagor would have no right to come in and pay it, and that it could never have been intended by the parties that the mortgagee might go on for 10, 20 or 100 years, accumulating the debt upon compound interest, whilst the mortgagor had no right to pay it off, and so prevent any further accumulation. There is another test, also, which is to be found in the authorities, and which might be applicable here, if we only had to deal with the covenant to pay the mortgage money, viz., that where a man promises to pay a sum of money, &c., on demand, which it is his duty to pay, whether a demand be made or not, then the money becomes payable at once, and no demand is necessary before suing him for it; as, for instance, in the case of money lent, and money due for goods sold, or for work done. But where a promise is made in consideration of some collateral thing being done on demand, there the demand must be made before the promise can be enforced, as in the case of a promise by A to pay Rs. 100 to B, if A should go to Dacca, on demand, or if A should pay Rs. 200 to C upon demand. (See *Bicks* vs. *Trippet*, 1 Wm. Saunders, 32; *Carter* vs. *Ring*, 3 Camp., 549; *Rumball* vs. *Ball*, 10 Mod. Rep., 38; Chitty on Contracts, 1286, 3rd edition.)

Here, no doubt, the mortgagor's covenant was to pay money lent, or to be lent, which it was his duty to re-pay, and part of which was declared by the deed to have already become due and payable. But my difficulty in saying, that a demand was unnecessary, and that the plaintiff had a right without any demand to enforce his remedies upon the mortgage, is this—that there is a special provision, that on demand of the debt due he may take possession of the mortgaged property; which means, I conceive, that he cannot take possession until demand. The demand of the money is (as regards that provision) a collateral act, which until the plaintiff has done, he is not entitled to take possession. If, then, the words "on demand" in that part of the deed are material, and mean that no possession is to be taken until demand made, it seems to me that they must mean the same in the other parts of the deed, viz., in the covenant to pay, and

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in the proviso for redemption. It can hardly be that words have different meanings in different parts of the deed; or, that the mortgagee might enforce his remedy way without a demand of the money, but could not d another way.

It appears to me, therefore, that the only reasonable cor tion to give to the deed is this: that, for certain purposes, to say, to secure the payment of interest to the mortgagee, allow the mortgagor at any time to pay off the debt, the mo money was to be considered as due and payable; but tl mortgagee was not at liberty to enforce any of his remedie he had demanded the money. That being so, the next q is, when was the demand made? The plaintiff says now, t demand was made until the 13th of September 1876, before suit.

If he is right in this, of course he is in time. But I c that Mr. Bonnerjee's argument on this head is well founde that we are justified under the circumstances disclosed in th in presuming that a demand must have been made in or the year 1847. It appears from the evidence of Eshan C Ghosal, who is the plaintiff's brother, that in that year an ble partition of the family property was in contemplatio on that occasion it was arranged that a specified portio should be given to the plaintiff in payment and satisfaction debt due to him from Hurrish Chunder. Now, before it coul been ascertained how much of the family property should t appropriated to payment of the debt, it is only reasonable t clude that the amount due must have been calculated, a the plaintiff must have made some demand or claim for that a Suppose, instead of so much land being appropriated to th ment of the debt, it had been arranged that a certain sum o stock should be sold out and so appropriated, surely, aft long lapse of time, and under the peculiar circumstances c a case as this, it would only be reasonable to presume t amount of the debt had been calculated and a demand made, otherwise the precise sum of stock necessary for thi pose could never have been ascertained. The plaintiff's e dence confirms this, so far as the arrangements to apportio

part of the property is concerned; but he denies that any demand of the debt was made until the 13th of September 1876. But we must look at his evidence in this and other respects with some distrust. He is interested, of course, in showing, on the one hand, that the existence of the debt was known in the family, and that he mentioned it to the defendant's mother-in-law in order to explain his own delay and laches; but, on the other hand, with a view to limitation, it is his direct interest to say, that no actual demand was ever made. Every reasonable presumption, as I have said before, must be made against a man who brings a suit under such circumstances.

I think, therefore, that we must presume, from the facts proved, that a demand was made in the year 1847, and then comes the further question, whether, even in that case, the plaintiff's suit is barred. The Advocate-General argues that it is not, because the Limitation Act in force when the suit was brought was the Act of 1871; and by the 149th article of that Act, a suit for possession of a mortgaged property may be brought by the mortgagee within sixty years. But that article is very peculiarly worded. The sixty years is to be reckoned from the time when any part of the principal and interest due upon the mortgage has been paid. But, suppose, as in this case, no part of the principal or interest has been paid, is there to be no limitation to such a suit? I confess, if it were necessary for us in this case to put a construction upon that article, I should be much disposed to hold that it is applicable to those cases only where some part of the principal or interest has been paid; and that in other cases the ordinary twelve years' limitation would apply. In cases where any part payment could be proved, the presumption that would arise from lapse of time (which is the principle upon which all Limitation Acts are founded) would not arise, or, at any rate, it would not be nearly so strong as in a case where no part payment had been made. And this might in some degree explain the extraordinary length of time which is allowed to a mortgagee under article 149. I am therefore disposed to think, that in a case of this kind where there has been no payment of any part of the mortgage debt or interest, the plaintiff's remedy was barred at the end of twelve years from the demand.

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But it seems to me that, on the question of limitation, here concluded by authority. Mr. Phillips contends, tha the Limitation Act of 1859, the plaintiff's remedy upon tl gage was not only barred, but the debt itself extinguishe therefore, that although the Act of 1871 may have repe Act of 1859, and may have given mortgagees sixty years of twelve to bring their suits, that Act would not in t revive the plaintiff's rights, inasmuch as the Act of 1859 only barred the remedy, but extinguished the debt. I c should have had some doubt as to the correctness of th ment, but I find that it was so decided by my brother and Mr. Justice PRINSEP in the case of *Krishna Mohun Okhilmonee Dossee*, (I. L. R., 3 Cal., 335); and as my MARKBY adheres to that view, I consider that in the prese we are bound by that decision. It has undoubtedly been h in the case of land, a twelve years' adverse possession bars the remedy of the rightful owner, but extinguishes hi and the 28th section of the Limitation Act of 1877 wou to extend that doctrine to any property other than land. think it very doubtful whether the same principle should to apply to debts. There are many cases where the cred always been considered to have a lien for his debt wl remedy for it by suit is barred; and the 60th section of t tract Act, which allows payments to be appropriated to t ments of debts barred by limitation, is perfectly inconsist the supposition that the debt itself is extinguished by t of time. I observe that Mr. Justice PRINSEP decided th case with some hesitation; and when an opportunity should be glad that the point, which is undoubtedly one general importance, should be considered by a Full Bench

In the present case, being bound by the above deci am of opinion, for the above reasons, that the appeal sh dismissed with costs.

MARKBY, *J.*

MARKBY, *J.*:—

The plaintiff in this case is one of the sons of Roc Ghosal, who died many years ago. The plaintiff and his formed a Hindu joint-family. The plaintiff, shortly a

ather's death, obtained letters of administration to his father's estate, against which there were considerable claims; and whilst he was in possession of the whole estate on behalf of himself and the other members of the family, he alleges that his brother Hurrish Chunder, in the year 1842, being much pressed by his own private creditors, executed a mortgage in the English form, whereby be conveyed to the plaintiff his one-sixth share of the family property to secure an advance of Rs. 3,700, and further advances up to Rs. 8,000, out of the plaintiff's private funds. No payment, either of principal or interest, has ever been made upon this loan, and the total amount now due thereon is the enormous sum af Rs. 3,10,000.

The present suit arose in this way:—One of the brothers, in 1871, commenced a suit for partition, the plaintiff being at that time still in possession of, and managing, the whole family estate. An order for partition was made, and commissioners were appointed. Whilst the commissioners were engaged in carrying out the partition, the plaintiff filed this suit to have it declared that the mortgage above stated was a valid one, and binding upon the one-sixth share to be allotted to the defendant under the partition as the daughter of Hurrish Chunder, who had died in 1851. The plaintiff also asks for a foreclosure, and for an injunction to restrain the defendant from taking possession of the one-sixth share allotted to her. Notwithstanding this suit, the commissioners have proceeded to a partition, the plaintiff has been ousted, and the defendant is now in possession of her one-sixth share. The suit was dismissed in the Court below. The plaintiff has appealed. There is no doubt that the mortgage deed was executed by Hurrish Chunder, but the defendant contends, *first*, that there was never in reality any mortgage at all, and that the only object for which that deed was executed was to protect Hurrish Chunder's property from his creditors; *secondly*, that, even if the mortgage was a real transaction, all claim under it is barred by limitation.

It is extremely difficult to determine satisfactorily the first of these questions at this distance of time, but I confess I have not been able to convince myself that the mortgage was a real transaction. I am very unwilling to come to that conclusion

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as against the plaintiff, who belongs to a respectable fam who has apparently behaved well and honestly in the ment of the family property; but the evidence whicl given has not convinced me of the truth of the story him. Hurrish Chunder, at his death in 1851, was succe his widow Omritomoye. She died in 1877, and was si by her daughter, the defendant. We are asked to beli during the whole of this period, nothing was paid ei principal or interest upon the debt due to the plaintiff; no demand was ever made for it. During the whole of t the income of Hurrish Chunder, and those who succeec was passing through the plaintiff's hands. One-sixth s the family property was worth Rs. 40,000, and for a grea years the family property has been unencumbered. Why the plaintiff have forborne during all these years to ma arrangement for paying off the debt, or at least for down the interest? Forbearance under such circumstau nothing less than cruelty to the widow and daughter of Chunder, who must inevitably be ruined if the debt was to go on accumulating.

There are also other circumstances in this case whic to me inconsistent with the existence of this claim. The tiff has an exactly similar claim against another brother, Chunder, which he is also now seeking to enforce in suit against Mohes's representatives. In regard to this gage, also, the same extraordinary reticence has been obse

In 1859, a suit for partition was commenced by the in the Supreme Court, which the plaintiff afterwards all be dismissed. No mention of either of these mortgag made in this suit, nor was any mention made of them suit of 1871, in which the partition took place, out o this suit arose. From a legal point of view, it was not sary to mention these mortgages in those suits. But they in the ordinary course of things, have been mentioned had been real transactions, because a partition could carried out without very materially affecting the plaintiff under these mortgages. And with regard to Mohes's m the conduct of the plaintiff has been wholly irreconcilab

the existence of any such claim. Mohes became a lunatic, and his person and property were placed under the control of the Court. There was an inquiry in the presence of the plaintiff as to what property Mohes was possessed of, and what would be a proper sum to allow for his maintenance. Without the slightest objection on the plaintiff's behalf, Mohes was found to be entitled to one-sixth of the family property, and the allowance was fixed accordingly. This part of the evidence was not perhaps strictly admissible, but it is on the record, and it was commented on in the argument before us by both sides, without objection as to its admissibility, and I cannot therefore overlook it.

Another circumstance which weighs very much with me against the plaintiff is, that he produces no books. I believe it to be a thing almost unheard of amongst Hindus, for a person, situated as the plaintiff was, not to keep books which would show his transaction along with his other transactions on his own account. He had considerable property separate from the family property. He invested this money in various transactions; and when he says that he kept no books in which these transactions were entered, I am bound to say that I find the very greatest difficulty in believing him.

But even if I could persuade myself that this loan was really made, I should still hold that the present suit was barred by limitation. Upon this point there has been much contention as to when the debt became due. This depends upon the construction of the mortgage deed. The mortgage deed begins with a recital, that the mortgagor "stands indebted" to the mortgagee in the sum of Rs. 3,700, and then states an agreement by the mortgagee to lend to the mortgagor a further sum not exceeding in all Rs. 8,000. Then, in the operative part, the mortgagor, in consideration of the sum of Rs. 3,700 "now already due as aforesaid," and the future advances, conveys his one-sixth share in the family property to the plaintiff. There is then a proviso, that if the mortgagor shall pay "on demand" to the mortgagee the said sum of Rs. 3,700, and interest at the rate of 12 per cent. per annum, he shall also re-pay "on demand" the further advances and such sums as "shall or may appear to be due and owing" upon any balance of account between the mortgagor and mortgagee, with inter-

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est for each and every such sum and sums of money and balance and balances of account respectively, at the rate of 12 per cent. per annum from the respective times when such sums should be advanced or such balance be struck, with annual rests on the 30th of April in each year, then the conveyance is to be void. There is then a covenant to pay "on demand" the said sum of Rs. 3,700, and the interest, very much in the same terms as the clause of defeazance, and there is also a right of entry reserved to the mortgagee in default of payment "on demand." There was at the same time executed a bond, and a warrant of attorney given to secure the same loan. The bond also recites the Rs. 3,700 to be due.

The plaintiffs now contend that no portion, either of principal or interest, was due until the 13th September 1876, when the mortgagee made a formal demand for Rs. 7,172-10-0 principal, being the amount of the original debt and the subsequent advances and interest at 12 per cent.

This seems to me to be rather a startling proposition. In the first place I don't quite see how, strictly speaking, a debt not due can carry interest and compound interest. Appropriate words might impose upon a debtor an obligation to pay a sum vastly greater than he had received, calculated in the same way as interest is calculated upon a debt overdue. But "interest" in its ordinary sense means something paid for money overdue, and *primâ facie*, a debt which carries interest appears to import a debt already due (see *Angell* on *Limitation*, page 90). In the next place, the bond and the deed both state several times over that the Rs. 3,700, at any rate, was actually then due, and from time to time balances were to be struck of what was due and owing, and the plaintiff from time to time did (as he says) strike those balances in a book which he kept for the purpose, and calculate the rate accordingly. The words "on demand," if taken to mean that the debt and interest is not to be due until demand, are wholly inconsistent with the other parts of the deed. Under these circumstances, it seems to me that, for the purpose of ascertaining when the debt became due, we ought to read in the mortgage deed and bond the words "on demand" in the same way as they are always read in a promissory note, and not as

postponing the date of payment. If we read them in the way in which the plaintiff desires to read them, the transaction would be a most unreasonable one. The mortgagor could not, according to the terms of the deed, so understood, redeem his property until the plaintiff chose to make his demand. Perhaps, a court of Equity would step in and compel the mortgagee to receive the money and return the property. But it is not likely that a mortgagor would put himself in such a position. Of course, if he has done so, he must take the consequences. But I confess this is not how I should read the stipulations. Upon the language of this deed, construed as a whole, I think that the money advanced was due as soon as the advances were made and that the interest became due as it accrued.

But, even if a demand were necessary, and there was no debt due until the demand was made, still there are, as the Chief Justice has pointed out, very good grounds for inferring that a demand was in fact made. I need not repeat those reasons; it is sufficient to say, that I concur with the Chief Justice's judgment upon this part of the case. This being so, there is no doubt that, as soon as the Act XIV of 1859 was passed, the suit for foreclosure was barred. The utmost the plaintiff could have under that Act was twelve years from the date of the mortgage, if a demand was not necessary, and from the date of the demand of the debt only when become due. In either case, the suit for foreclosure was barred by the operation of Act XIV of 1859, before Act IX of 1871 came into force; and if the right to bring a suit for foreclosure was barred by the Act of 1859, it has been held that it could not be revived by the Act of 1871. These cases are reported in Ind. L. R., 3 Cal., 331; Ind. L. R., 1 Cal., 328, and 13 Ind. L. R., 445.

Moreover, even under the Act of 1871, I do not at present see how the plaintiff can get more than twelve years, from the date when the debt became due, to bring his suit for foreclosure. In my opinion, therefore, the suit for foreclosure is barred.

With regard to possession, even if we could treat the present as a suit of that nature, it seems to me that the plaintiff must finally fail. I agree with the learned Judge in the Court below, that the plaintiff was, until ousted by the proceedings on the

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partition, in possession as manager and not as mortgagee. He now seeks to get possession, not of the undivided share which was mortgaged to him, but of that which upon partition has been substituted for it. He has a right to do this, if the mortgage debt is still subsisting, but, in my opinion, his claim to that debt being barred, he has no longer any right to recover possession either of the mortgaged property or of what has been substituted for it.

The plaintiffs have relied upon clause 149 of the Act of 1871. As in my view of the matter, the plaintiff's right to possession was extinguished before that clause came into operation, I do not think that clause can, upon any construction of it, help him. But, even if it were otherwise, the sixty years spoken of in that clause is sixty years from the date when any part of the principal or interest was last paid on account of the mortgage debt. This would seem as if the clause only applied to transactions where something had been paid for principal or interest, and there may be a good reason for this; for where some part of the principal and interest has been paid, there is not likely to be any dispute as to the original transaction, of which the payment operates as an acknowledgment. For these reasons I agree that the appeal should be dismissed with costs.

[ORIGINAL CIVIL JURISDICTION.]

MIMONY DOSSEE AND ANOTHER . . . PLAINTIFFS; 1878 *May 30th.*

AND

ARINEE DOSSEE . . . . . DEFENDANT.

ship—Agreement to refer to Arbitration—Power of Court in which award is filed—Act VIII of 1859, *section* 326.

Where the partners of a firm in their partnership deed agreed to refer ir disputes to arbitration; and the reference made in pursuance of agreement gave the arbitrators a power to make partition, but itted a power to sell: *Held*, on the award being made a rule of rt, that the Court had no power, under section 326, Act VIII, 1859 order the sale of certain property of which the arbitrators were ble to make partition, and the sale of which they recommended on t ground.

is case, Beer Nursing Dey, Nursing Chunder Dey, and l Chunder Bannerjee carried on business as wine merchants cutta in 1874. In 1875 Nursing Chunder Dey was s of withdrawing from the partnership. The parties d as to the shares to which they were respectively entitled, y agreed to refer these disputes to arbitrators who were ke a partition of the partnership property. The award of itrators was made a rule of Court on the 13th day of ry 1876. The arbitrators found that it was impossible de the family dwelling house and other houses amongst rties, and recommended that they should be sold by the ar under the direction of the Court.

son and *Phillips* now applied on behalf of the plaintiffs firmation of the award, and asked that the Court would out the recommendation of the arbitrators respecting the the houses.

nerjee, for the defendant, refused his consent to the sale.

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PONTIFEX, J., said that the arbitrators had not been given a power to sell and partition, but a power to partition only; that section 326, Act VIII of 1859, only made the proceeding a suit for some purposes and did not empower him to order a sale of the premises. The parties must bring a regular suit for that purpose. Award confirmed.

[ORIGINAL CIVIL JURISDICTION.]

DORAB ALLY KHAN . . . . . PLAINTIFF;

AND

Decr. 5th

No. 658 of 1878.

ABDOOL AZEEZ AND ANOTHER . . . . . DEFENDANTS.

Restitution—Refund of Costs—Costs paid under Decrees which are reversed—Motion.

Where plaintiff's suit is dismissed with costs on a preliminary point in the Court of First Instance, and on appeal, and these decrees are reversed and the case remanded by the Privy Council, a refund of the costs which have been taxed and paid under the reversed decrees will be ordered on motion.

IN 1872 plaintiff brought a suit in the High Court at Calcutta against the defendants for Rs. 26,000, and interest, as money had and received to the plaintiff's use. The suit was dismissed with costs on the 22nd of April 1875, on the ground that the plaint disclosed no cause of action. The plaintiff appealed, and, on the 23rd of August 1875, the appeal was dismissed with costs. Both sets of costs were taxed and paid to the defendants, the former on the 3rd of July 1875, and the latter on the 21st of March 1876. Plaintiff having appealed to the Privy Council, their Lordships reversed both decrees and remanded the case to be tried on the merits. Costs of the appeal to the Privy Council to be costs in the cause.

Phillips, on behalf of the plaintiffs, moved for an order that the defendants refund the amount of the taxed costs paid under the reversed decrees, with interest from the date of payment. In England, the proper course would be to obtain a writ of restitution,—*Archbold's Prac.*, vol. I., 643,—but there being no writ of restitution here it must be done by motion.

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Branson, for the defendants.—The proper course is to apply to e Privy Council. We have no objection to refund the money, the other side give security. At all events, no interest should given.

PONTIFEX, *J.*, made an order that the defendants refund the ney, with interest from the date of the order to date of payit, at 6 per cent. Costs of the application to be costs in the :. Case to go to the bottom of the remanet board for final osal.]

[CIVIL APPELLATE JURISDICTION.]

August 2nd

No. 2585 of 1877.

BODEEP CHUNDER SHAHA . . . . PLAINTIFF;

AND

ONARAM DASS AND OTHERS . . . . DEFENDANTS.

vice of Notice—Enhancement—Notice of Enhancement—Joint Family.

Of three brothers forming a joint Hindu family two only lived in the joint family dwelling house, the third residing in another district. The landlord of a jote held jointly by the three brothers sued for rent at an enhanced rate. The notice of enhancement was served only on the two who lived in the joint family dwelling house. *Held,* that the service was sufficient.

PEAL from an appellate decree, passed by the Judge of gpore, modifying that of the Moonsiff of Burrobarry.

aboo *Nilmadhub Bose,* and Baboo *Tarinee Bhuttacharjee,* for ellant.

aboo *Bharrut Chunder Dutt,* for Respondents.

he facts of the case are sufficiently set forth in the judgment he High Court (1), which is as follows :—

this case the Moonsiff awarded a decree for 14 rupees mas 3 gundahs and 2 krants, as arrears of rent for the year against the defendants Shonaram Dass, Rammanando Dass, mneedhee Dass, the sons of Sheetaram Dass. It appears the finding of the Courts below that these three brothers ate a joint Hindu family, and the tenure, the rent of which ht to be enhanced, belongs to this joint family.

of the questions raised in this case was that notice of

(1) MITTER and MACLEAN, *J.J.*

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enhancement was not served on Ramneedhee Dass. The fac reference to this objection are these :—These three broth already stated, are members of a joint Hindu family ; Ramn Dass resides at Kooch Behar, where he acts as Mooktear. notice of enhancement was issued by the Zemindar a served personally on Shonaram Dass and Rammanando who reside in their family residence. The Moonsiff was nion that under these circumstances the service of the noti sufficient in law.

The District Judge has come to a different conclusion point with reference to Ramneedhee Dass. He thinks tha having been neither personal service upon Ramneedhee Da substituted service as provided by section 14 of Act VIII (E 1869, the suit cannot be decreed as against him. He has dingly modified the decree of the Moonsiff as against Ra dhee Dass : in fact he has dismissed the suit as against him ing the decree as against Shonaram Dass and Rammanand in tact.

We think that the decision of the District Judge is n rect. It is quite clear that in this case the Zemindar wa bound to issue three separate notices to the three brothers, S ram Dass, Rammanando Dass and Ramneedhee Dass. constitute a joint Hindu family, and the tenure in quest held by that family. The Zemindar was, therefore, not bo issue separate notices to them.

That being so under the admitted facts of this case, impossible to serve that notice personally on all these thre sons, because Shonaram Dass and Rammanando Dass reside family dwelling house, and Ramneedhee Dass in a distant c at Kooch Behar. We think that where a joint family tenure it is sufficient service within the meaning of sectio any one of the co-sharers is served with the notice.

In this view of the case, we think that there was sufficie vice of the notice under section 14 upon the joint owners tenure. We are, therefore, of opinion that the District Jud not right in dismissing the suit as against Ramneedhe We, therefore, reverse the decree of the lower Appellate and restore that of the Moonsiff with costs.

[CIVIL APPELLATE JURISDICTION.]

WILLIAM NICHOLLS AND OTHERS . . . . PLAINTIFFS;

AND

MARGARET CHARLOTTE WILSON . . . DEFENDANTS.

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August 2nd.

No. 15 of 1878.

Appropriation of payments—Guarantee—Construction of Contract.

Plaintiffs lent money to a registered company for which they acted as treasurers and bankers. It was agreed that they should re-pay themselves out of the first moneys which they should receive on account of the company, and two of the directors held themselves personally responsible each for half the amount of any deficiency in the amount so realized. In a suit against the executrix of one of the directors on the guarantee,

Held, affirming the decision of WHITE *J.*, that the plaintiffs were bound as between themselves and the guarantors to pay themselves the amount of the loan first of all, and were not entitled to exclude the expenses necessary for carrying on the business in which the company were engaged.

City Discount Co. vs. *McLean*, L. R., 9 C. P., 692, cited and distinguished.

APPEAL from a decree passed by Mr. Justice WHITE, in the Original Civil Jurisdiction of the High Court, dismissing the plaintiffs' suit with costs. The judgment of the learned Judge is as follows :—

This suit is brought against the defendant who is the widow and the executrix of the late Mr. C. H. B. Wilson, to enforce against his estate a guarantee given by him and a Mr. Shanks to the plaintiffs on the 14th July 1875. Messieurs Wilson and Shanks were at that date two of the directors of the Corinthian Theatre Company, which was established for the purpose of giving theatrical and operatic performances in Calcutta, and registered as a limited Company on the 22nd of July 1875, under Act X of 1866. Mr. Shanks has paid his half of what the plaintiffs claim under the guarantee, and the object of this suit is the recovery of the other half, which is laid in the plaint at Rs. 6,702-6-6.

The defendant, by her written statement, puts the plaintiffs upon strict proof of their claim, which she is entitled to do. She

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further pleads that the plaintiffs, without the knowledge or sent of Mr. Wilson, entered into an arrangement with the pany, whereby moneys, which ought to have been appli reduction of the guaranteed amount, were diverted to othe poses, and that consequently her husband's estate has discharged from all liability under the guarantee; and she a the 5th paragraph of the written statement, "If the est the said deceased has not been so discharged, then she se an account of all moneys in any way received or which migh been received (but for the fresh arrangements so as afo made without the knowledge or consent of the directors but the knowledge and consent of the plaintiffs) by the plaintiff or on behalf of the said Company, so that it may be ascer to what, if any, extent the estate of the deceased is liable."

The guarantee sued upon is in these words:—"The under directors of the Corinthian Theatre Company, Limited, h agree that if Messrs. Nicholls and Company pay the p money (from Melbourne to Calcutta, including Railway fa any) of the Company engaged by Messrs. Freyberger and A son, that Messrs. Nicholls and Company shall repay them the amount from the first moneys received by them on acco the said Corinthian Theatre Company, Limited; secondly, e these two directors agrees to hold himself personally respo for the payment of half of the amount of any deficiency (there be any) of the amount realized by Messrs. Nicholl Company in the manner above described."

It was not disputed at the trial that the guarantee was by Mr. Wilson, or that the defendant is his executrix. N it disputed that the Company or troupe engaged by Messrs. berger and Anderson arrived in Calcutta, and that the p money and Railway fares of the troupe were advanced an by the plaintiffs. There is some variation in the evidence Nicholls as to the amount so paid, and some indistinctness explanation as to the way in which that precise amou made up. This probably arose from the difficulty of dis ling from the accounts, as kept by the plaintiffs, the items came under the head of passage money and Railway fares Nicholls first stated that the amount was Rs. 13,404-12-11,

agrees with the figures in the plaint, but subsequently put the amount at Rs. 13,113-13-4. The whole of this sum was not paid at one time, but with the exception of Rs. 24-1-4, was advanced in the following amounts on the following dates :—

Rupees	4,800	0	0	on the 3rd of August		1875.
„	1,362	8	0	„	4th September	„
„	130	6	0	„	7th „	„
„	6,691	12	0	„	13th „	„
„	105	2	0	„	18th October	„

The only payment mentioned by Mr. Nicholls as that out of which the Rs. 24-1-4 can come, is one of Rs. 922-0-11 made by him on the 29th of July 1875. This is not very satisfactory, and the less so, as the plaintiffs, in the 7th paragraph of the plaint, introduce a copy of an account in which the payments made under the guarantee are represented as consisting of quite different amounts. I understand, however, that to avoid the expense of a commission, the defendant consented to accept the evidence which the plaintiffs should adduce as to the amount paid under the guarantee, and her counsel not having cross-examined Mr. Nicholls further on the subject, I must act on Mr. Nicholls' statement that the aggregate of payments is Rs. 13,113-13-4, that the first of them was Rs. 24-1-4 made on the 29th of July 1875, and the remainder of them on the respective dates which I have mentioned.

The plaintiffs' case is that no part of this large sum has been repaid to them by the Corinthian Theatre Company, which is the principal debtor.

The evidence, which is that of Mr. Nicholls, one of the plaintiffs, shows that the plaintiffs were the financial agents of the Theatre Company, and also acted as its bankers and treasurers, and kept its accounts. All money paid to the account of the Company was received by the plaintiffs, and all disbursements on accounts of the Company were made by them. The plaintiffs opened no separate account with respect to the sums advanced by them to the Company under the guarantee, but from time to time entered them as they were paid in the general cash account which was kept by the plaintiffs for the Company.

On the other hand, the evidence shows (see exhibits 2 and 7) it between the 14th of July, the date of the guarantee, and the sing of the business of the Company, the plaintiffs received, on ount of the Company in the shape of share, capital, debenres, rent, &c., various sums, amounting to Rs. 20,546-5-3, of ich Rs. 450, as Mr. Nicholls' stated, was received between the th of July and 3rd of August, Rs. 1,000 between the latter date l the end of August, Rs. 2,486 from the end of August to 13th September, and Rs. 2,301 from the latter date to 19th Sepnber.

In the face of these figures and of the account kept as the intiffs kept it, it seems impossible to contend that no part the advances originally covered by the guarantee have been d by the Company.

In the first place, the actual balance after deducting the . 1,535, which, in no view of the case, is covered by the guatee, is less than the amount stated by Mr. Nicholls to have n advanced under the guarantee. In the second place, even there had been no stipulation as to the application of receipts, l, considering the way the plaintiffs kept the account, some of advances must have been reduced by the operation of the rule appropriation laid down in the 61st section of the Indian ntract Act.

The plaintiffs, however, insist that the whole of the guaranteed rances remain unpaid. What they have in effect done is this : y have extracted from the final actual balance due to them m the Company at the end of January 1876, the sum of s. 13,113-13-4, and treated that sum as representing the ances made by them for the travelling expenses of the troupe, as left unpaid by the Company. Are they entitled so to do? brings me to consider the construction of the guarantee.

e document (A) has a two-fold aspect. It consists of two graphs. In the first paragraph Messieurs Shanks and Wilson, rting to act as directors of the Company, agree, that if the iffs will advance the money for the travelling expenses of oupe, they shall repay themselves the amount from the first n received by them on account of the Theatre Company. second paragraph contains the personal guarantee of each of

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the directors in his individual capacity: it refers to the first paragraph, and in order to measure the nature and extent of the guarantee the two must be considered together. What Mr. Wilson guaranteed was not the half of whatever balance should be due to the plaintiffs from the Company to the extent of Rs. 13,113-13-4, nor was it the payment of half the plaintiffs' advances for the travelling expenses of the troupe, but of half the amount of a certain deficiency, the deficiency being "*of the amount realised by Messieurs Nicholls and Company in the manner above described.*" A reference to the preceding paragraph of the document shows that the *amount* intended to be realised was the aggregate of the first moneys received by the plaintiffs on account of the Theatre Company, and the *manner* in which it was to be realised was by the plaintiffs re-paying themselves these advances out of their first receipts of money.

The plaintiffs' firm, as I have mentioned, were the financial agents and acted as bankers and treasurers of the Company, and as such, received the money of the Company. Messieurs Shanks and Wilson were two of its directors. The intention of the first paragraph of the document, although in form an agreement, was to authorise and direct the plaintiffs to appropriate the first moneys received from the Company to the re-payment of these particular advances.

It is argued by Mr. Phillips that Messieurs Shanks and Wilson neither did nor could make, as against the Company, a valid appropriation of the Company's money in the manner contemplated by the first paragraph of document (A), and that therefore the plaintiffs were not bound to attend to the direction. In the view which I take of the matter, it is unnecessary to determine whether the appropriation was or was not binding as against the Company; for taking it not to be so, still in the absence of any direction from the Company to the contrary, there was nothing to prevent the plaintiffs, who were the bankers of the Company and the recipients of its money, and who had advanced the money mentioned in the guarantee to the Company, from appropriating the first receipts to the discharge of those advances.

The law of appropriation of payments is found in the 59th, 60th and 61st sections of the Indian Contract Act.

: plaintiffs were at liberty to apply the money received by on behalf of the Company to the payment of any of their ces from the Company until the latter interfered. Why ould they not apply it to the guaranteed advances?

eems to me clear that if they could do so, and so long as could do so, they were bound as between themselves and Wilson to do so under the terms of the guarantee, and that do so is a departure from the engagement subsisting be- them and their surety, Mr. Wilson. The evidence of Nicholls is, that at all events up to the 27th of September the Company never interfered in the matter. He says: r to the 14th of July no agreement was made with the any as to the application of any part of the receipts of the any. I had no agreement with the Company as to the priation of the receipts to any special purpose up to the 27th ptember 1875." Up to that date, therefore, at least the iffs could and ought to have applied the receipts to the tion of the guaranteed debt. At that date, no doubt, a reso- was passed bearing on the subject; and the first question rises on the resolution is, whether it disabled the plaintiffs applying subsequent receipts in the way contemplated by uarantee. The resolution is as follows:—"Resolved that s. Nicholls & Co. be requested to pay all sums due on nt of the Theatre up to Wednesday, the 22nd instant, and are authorised to receive all sums due to the Company on ver account, and to apply the same for the purpose of such ent and to reimburse themselves for all payments already by them."

e resolution, no doubt, contemplates that the plaintiffs should further advances, which they did, and authorises them ceive and apply all moneys due to the Company on what- account to repay themselves such advances; but it goes on that they may also apply the receipts *to reimburse them- for all payments already made.* This would include the ces made for the travelling expenses of the troupe. I opinion, therefore, that the resolution left them free to the receipts in reduction of these advances. The resolu- not necessitate any alteration in the mode of keeping

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the Company's accounts adopted by the plaintiffs. In point of fact, the accounts were kept by the plaintiffs in the same way after the resolution as before, and as they had been kept all along, viz., all receipts were entered in one general cash account as and when they were received, and all payments on the other side of the account as and when they were paid.

If I had been obliged to hold that the plaintiffs were precluded from continuing to make the appropriation directed by the guarantee, a second question would have arisen,—whether, having regard to the facts that the plaintiff Nicholls was present when the resolution was passed, and that his Firm acted upon the resolution by making further advances, there has not been such a departure from the terms of the guarantee on the part of the plaintiffs as released Mr. Wilson; or if it did not release him, whether in the account as between his estate and the plaintiffs, he is not entitled to have all the payments which were applied under the resolution treated as if they had been applied in reduction of the guaranteed advances.

Mr. Phillips argued that the direction in the document (A) to apply first receipts to the discharge of the advances covered by the guarantee, meant the first receipts after applying so much of them as was necessary to meet the current expenses of the Company. I see no reason for putting other than the natural construction upon the words "first receipts." The plaintiffs no doubt, did subsequent to the guarantee, advance considerable sums to the Company over and above the Rs. 13,113-3-4 and but for these additional advances the Company would have come to an end sooner than it did. But I am unable to perceive how these circumstances can affect the construction of the guarantee, or can warrant any holding that by first receipts were intended surplus receipts after payment of the monthly expenses of the Company. Assuming the appropriation directed by the first paragraph of document (A) not to be binding on the Company, the latter might doubtless have diverted the receipts to be applied to the payment of such expenses; but it did not do so. So also the plaintiffs might have refused to make further advances beyond the Rs. 13,113, but they did not do so; and accordingly the business of the Company drag

il January 1876. The plaintiffs cannot now, as against tate of their surety Mr. Wilson, put themselves in the osition as if the Company had given such a direction or ad refused to make the additional advances. They can- r turn round and say that "because the receipts subse- to the guarantee proved insufficient to pay the current s, we are entitled to take all the receipts between 11th of d the closing of the Company, in discharge of our old hich was subsisting at the date of the guarantee and of our nal advances, over and above the Rs. 13,113-3-4."

r proceed to consider the plea of discharge set up by the nt. That plea is founded upon the resolution of the 27th of ber, to which I have already referred. There is no doubt vas passed without the knowledge or consent of Mr. Wilson. l ceased at the time to be a director of the Company, s moreover absent from Calcutta, or at least not present meeting which passed the resolution. But I do not think resolution did amount to an arrangement between the 's and the Company of the nature described in the plea. ot, in my opinion, compel the plaintiffs to divert from the eed debt the money which they subsequently received Company.

Bell further contended that the effect of the resolution mpair the eventual remedy of Mr. Wilson against the y, the principal debtor, and that the surety was conse- discharged under section 139 of the Indian Contract

impairment alleged was, that if Mr. Wilson had paid & Co. his share of the money advanced under the gua- the resolution would have stood in the way of his recover- amount so paid from the Theatre Company. I am to see that such is the effect or consequence of the reso- It cannot, I think, be placed higher than a taking of from the principal debtor, in which case the surety entitled to the benefit of the security, if he paid off the

whole, then, I am of opinion that, having regard to the the guarantee, it is incumbent on the plaintiffs to

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show that there is a deficiency still subsisting between the Rs. 13,113-13-4, and the money received by them for the Company since the same was advanced. If the whole of the Rs. 13,113-13-4 had been paid in one sum, it would have been sufficient to ascertain whether money to that amount had been received by the plaintiffs for the Company between the date of the guarantee, and the close of its business; but as the guaranteed advances were made in different sums at different times, it is necessary further to ascertain what money was received for the Company between each advance. If in the interval more money was received than was sufficient to repay the portion advanced, the excess may be properly applied by the plaintiffs in reduction of their unguaranteed advances to the Company. But if less was received, the future receipts must be applied in reduction of each guaranteed advance until the whole of it is paid off or the receipts fail.

Adopting this mode of ascertainment, it appears from the evidence that the first advance of Rs. 24-1-4 was fully paid out of the receipts before the second advance was made, and that there was a surplus of receipts which could be properly applied by the plaintiffs in reduction of their unguaranteed advances. As regards the remaining five advances, ranging in date from the 3rd of August to the 10th of October, both inclusive, it appears from the evidence and the fair cash book No. 1, which I have examined, that the money received by the plaintiffs for the Company between those intervals, was not sufficient to pay off these five advances, and that sufficient money for the purpose was not received until the 3rd of December 1875.

At that date, as I understand the accounts, the deficiency which Mr. Wilson guaranteed ceased to exist, and his liability under the guarantee determined.

The plaintiffs appealed.

Branson and *Phillips*, for the Appellants.

The guarantee must be construed according to the surrounding circumstances and the intention of the parties. First moneys do not mean first gross receipts, but the first moneys after payment of current expenses. These were necessary to keep the Theatre

ying, and it would have been *ultra vires* of the directors to satisfy another debt with the money required for them—*Brice* on Ultra Vires, p. 603. Messrs. Nicholls and Co. are bankers, and the first moneys meant the first moneys which they should receive as bankers, and they received none. Any money they did receive they got as cash-keepers or treasurers and not as bankers. The appropriation of payment in the order of time may be rebutted by the circumstances of the case—*The City Discount Co.* vs. *McLean*, L. R., 9 C. P., 692.

J. D. Bell and *Stokoe*, for the Respondents, were not called upon.

The judgment of the High Court (1) was delivered by

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We think that this is a very clear case, and it would almost have been sufficient to say that we entirely agree with the learned Judge in the Court below. The whole question depends upon the meaning of the guarantee, upon which the suit is brought.

The plaintiffs' firm had acted since the year 1874 as the agents and bankers of the Corinthian Theatre Company. That Company were importing, in August 1875, several actors from Australia, who were to play at the Corinthian Theatre; and the Company had a difficulty about paying the expenses of their passage. Under these circumstances, the Company applied to the plaintiffs to advance the passage money, but the plaintiffs were not content to make the advance upon the responsibility of the Company only, and desired to have the personal security of two of the directors. Upon this, Messrs. Shanks and Wilson entered into the guarantee in question, which is in these words:—

"The undersigned directors of the Corinthian Theatre Company, Limited, hereby agree that if Messrs. Nicholls & Co. pay the passage money (from Melbourne to Calcutta, including Railway fare, if any) of the Company engaged by Messrs. Freyberger and Anderson, that Messrs. Nicholls & Co. shall repay themselves the amount *from the first moneys received by them on account of the said Corinthian Theatre Company, Limited.* Each of these

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two directors agrees to hold himself personally responsible for the payment of half of the amount of any deficiency (should there be any) of the amount realized by Messrs. Nicholls & Co., in the manner above described.

ARTHUR SHANKS.
C. H. B. WILSON."

Calcutta, 14*th July* 1875.

It then appears that in the months of August, September and October 1875, the plaintiffs did pay sums for the passage of the actors, amounting altogether to Rs. 13,113-13-4; half of this amount has been since paid by Mr. Shanks, and this suit is brought to recover the other half from the defendant, who is the executrix of Mr. Wilson, the other party to the guarantee. Her defence is, that after these moneys were advanced, the plaintiffs did in fact receive moneys from the Company, far exceeding altogether the amount paid for passage money; and that they were legally bound by the terms of the guarantee to have reimbursed themselves out of those moneys.

In answer to this, it is contended by the plaintiffs that, although the guarantee says that Messrs. Nicholls & Co. are to repay themselves from the first moneys received by them on account of the Company, that does not mean "the first money that they might actually receive," but "the first moneys available for that purpose." Mr. Branson, in his argument, went so far as to say that the plaintiffs had no right to appropriate the moneys which they were receiving day by day towards payment of the debt due for passage money, because by doing so, the business of the Theatre might be stopped; and that if it were doubtful, whether the business would be ultimately successful, the plaintiffs might go on to the end of the season appropriating the Company's moneys to other debts and objects, and only repay themselves this particular debt in case there were a balance in the Company's favour at the end of the season available for that purpose.

But we think, having regard to the terms of the guarantee and the circumstances under which it was given, that this argument is wholly untenable. We must construe the guarantee, as we should any other instrument, according to its natural

ordinary sense and meaning; and we have no right, as against the defendant, to distort or amplify the language in order to put an unnatural construction upon it, to suit the views of the plaintiffs or of the Company.

At the time when the guarantee was given, the plaintiffs had been acting for some time as the bankers or agents of the Company, advancing money to them from time to time, and paying and receiving money for them almost daily; and keeping a regular cash account with them, which was regularly entered in the plaintiffs' ledger. The guarantors knew this perfectly well. They knew that the Company had not then sufficient assets to pay the passage money, and they said in effect to the plaintiffs by this guarantee, "If you will advance the necessary money for the Company, and will repay yourselves the amount out of the first moneys of their's which may come to your hands, we will guarantee you against any loss, if you should not receive enough to cover your advances." Under these circumstances we think it clear that the words "the first moneys" can have but one meaning; and that the plaintiffs were bound to appropriate the first moneys of the Company which they received towards payment of this particular debt.

Instead of this, it appears that they have applied these moneys towards payment of other debts due to themselves. Thus, for example, we will take the first items on the credit side of the cash account on and after the 3rd of August, on which day the plaintiffs made the first payment for passage money, viz., Rs. 4,800. On that day the plaintiffs received from the Company Rs. 450 for calls on shares; and on the 6th and 11th of August, Rs. 750 and Rs. 250, also calls, in all Rs. 1,450. Instead of appropriating this sum towards payment of the Rs. 4,800 passage money, they applied it, as appears from the account, in part payment of a balance of Rs. 2,452-7-9, which was then due to themselves for prior advances to the Company. And this is what they seek to do now. They were attempting to appropriate the moneys which they have since received from the Company to the payment of other sums which they have paid on the Company's account, and to postpone the payment of this particular debt for passage money to the payment of those other debts.

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We consider that they have no right to do this as against the guarantors. They were bound to appropriate the first receipts to the payment of this debt, and if they omitted to do so, it was at their own risk. As they have in fact received sufficient to pay the amount of the passage money, the guarantee is discharged.

Another point was then made by Mr. Branson, that this cash account was not an ordinary Dr. and Cr. account kept by the plaintiffs as bankers or agents, but as treasurers of the Company. But this really makes no difference. Whether the plaintiffs were treasurers or not, this was an account kept by them with the Company in which receipts and payments were regularly entered, and which was posted, like the other accounts of the plaintiff's customers in their ledger. No other account was kept by the plaintiffs with the Company but this, and as the guarantee clearly had reference to some account which was being kept between the plaintiffs and the Company, it is plain that this was the account which both parties had in view, when the guarantee was given. It cannot be pretended that whatever the account may have been called, the plaintiffs had not a right to retain any sums received by them on that account against debts due to them from the Company.

Mr. Branson called our attention to the case of the *City Discount Co.* vs. *McLean*, L. R., 9 C. P., 692, but this case has really no application to the present. It only decides that the well-known rule laid down in *Clayton's case*, 1 Mer., 572, that payments credited on one side of an account should, in the absence of any specific appropriation, go to discharge in order of date the earlier items on the debit side, is not an arbitrary and inflexible rule, but that it may be modified or departed from under special circumstances. In this case the guarantee itself expressly provides the proper mode of appropriation, and the plaintiffs are of course bound by the terms of it. We consider the case to be perfectly clear, and we dismiss the appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

JUGGERNAUTH DOSS . . . . . DEFENDANT;

AND

BRIJNAUTH DOSS . . . . . PLAINTIFF.

1878. *August 16th.*

No. 13 of 1878.

Jurisdiction—Land, Suit for—Title Deeds—Tender—Lien—Jus Tertii.

In the year 1835, A conveyed certain immoveable property lying in Calcutta to his wife B, who made a gift of it to her nephew C in 1852. C had bought other immoveable property in the Mofussil in 1849. In 1873, B, as agent of C, deposited the title deeds of the latter property and some jewellery with the defendant as security for a loan to B. In 1874, C died, and after his death B handed over the title deeds of the Calcutta property also to the defendant. The heir of C brought the present suit against the defendant for the recovery of the two sets of title deeds and of the jewellery. The defendant claimed them and the property to which they related as heir of A, on the ground that the conveyances of 1835 and 1852 were illusory, and that the mofussil property had been purchased with the accumulations of the Calcutta property, and therefore was part of A's estate. He also pleaded, that a suit for the title deeds of the mofussil property was a suit for land within the meaning of section 12 of the Charter; and that as to the jewellery, though deposited by B's agent, it was the separate property of B's wife, and that therefore the plaintiff had no interest in it. The facts were found against the defendant, and it was

Held, that a suit for title deeds to property situated in the mofussil is not a suit for land within the meaning of section 12 of the Charter, and may, therefore, be instituted in the original side of the High Court; that as between plaintiff and defendant the title deeds of the Calcutta property were the undoubted property of the plaintiff, even though the gift from B to C were illusory, since B had not sued to have the gift set aside; and that the title deeds of the garden and the jewellery having been received from C's agent, as security for a loan to B, the defendant could not set up against the plaintiff the title of a third party.

Held, also, that when a person has a lien on the property of another which is in his possession, for the amount of a loan made to that other, he cannot set up his lien as a defence to a suit in detinue by the latter, unless he shows that at the commencement of the suit he was ready to deliver up the property on payment of the sum for which he had the lien.

Boardman vs. *Sill*, 1 Camp., 410; and *Dirks* vs. *Richards*, 4 M. & Gr., 574, cited and followed.

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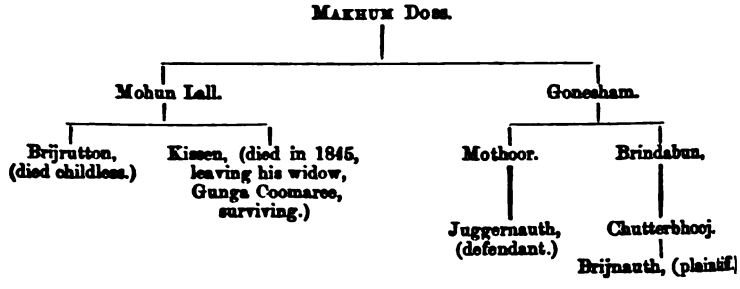
Statement.

APPEAL from a decree passed by Mr. Justice PONTIFEX in the Original Civil Jurisdiction of the High Court. The following genealogical table will serve to explain the facts of the case:—



This was a suit for possession of the title deeds of a house 75, Burtollah Street, in the town of Calcutta, and a garden in Kakurgachee, (beyond the Original Jurisdiction of High Court, and of certain articles of jewellery in possession of the defendant. The house had formerly belonged to Kissen, the grandson of Makhum Doss, who, in 1835, conveyed it to his wife, Gunga Coomaree, by lease and release, stated to be for valuable consideration. Kissen died in 1845, and in 1852 Gunga Coomaree conveyed the house to Chutterbhooj, the father of the plaintiff in whose house she then lived. In 1859, Gunga Coomaree made a will, which recited and confirmed the gift. Chutterbhooj died on the 11th of January 1874, and on his death Gunga Coomaree deposited the deeds relating to the house, and other papers, together with some jewellery, with the defendant for safe keeping, he being the nearest adult male relation. As regards the garden in Kakurgachee, that was bought by Chutterbhooj, or rather the conveyance was made to him by the former owner in 184[illegible] and in 1868 he mortgaged it to one Gunga Coomar Dutt, who obtained a decree for sale in 1873. Before the sale took place Gunga Coomaree, at the request of Chutterbhooj, who was then up-country, asked the defendant to pay the amount of the decree and take the deeds into his possession; and as further security for the re-payment of the money, she deposited a quantity of jewellery. The plaintiff alleged that he had made a tender of the amount due to the defendant and demanded back the

deeds and the jewellery, but that the defendant refused to deliver them up.

At the hearing the defendant admitted that the house had been the separate property of Kissen Doss; but he contended that the conveyance to Gunga Coomaree was a sham transaction; that the garden in Kakurgachee had been purchased by Gunga Coomaree, *benami* in the name of Chutterbhooj, with the income of the house 75, Burtollah Street; and he asserted his right to the properties as heir to Kissen Doss. As to the jewellery, he denied that they had been demanded from him, but he was willing to deliver them up to the proper party on payment of the money for which they were deposited. At the same time, he contended that the plaintiff had no claim to the jewellery, they being the property of his mother, plaintiff's next friend.

Mr. Justice WHITE threw the onus on the defendant, who failed to prove his allegations; and the learned Judge found that there had been a tender some time (date uncertain) before the filing of the plaint, but as the defendant at the hearing swore that, if a tender had been made, he considered (citing *Kerford* vs. *Mondel*, 28 Law Jour., Exch. 303,) that a tender was not necessary, and he gave a decree for the delivery up of the title deeds of the house, 75 Burtollah Street, and the jewellery which had been handed over at the same time; that the defendant should deliver up the title deeds of the garden at Kakurgachee, and the jewellery deposited, on the receipt by him of the money paid on the decree of 1873, and interest at 12 per cent. to date of tender, (which he put at the filing of the plaint,) and that he also should pay the costs of the suit. The defendant appealed.

Bonnerjee and *Sale*, for the Appellants, contended that the onus should have been placed on the plaintiff, and not on the defendant; that as to the title deeds the suit was really one for land in the mofussil, and therefore the High Court had no jurisdiction.—*Delhi and London Bank* vs. *Wordie*, I. L. R., 1 Cal., 249; *Wilkie* vs. *Fraser*, I. L. R., 2 Cal., 445. They also argued that the plaintiff must prove a tender.

The respondent was not called upon.

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The judgment of the High Court (1) was as follows:—

This suit was brought on behalf of Brijnauth Doss, an infant, to recover from the defendant, Juggernauth Doss, who is a cousin of the plaintiff, the title deeds of two properties, one a house No. 75, Burtollah Street, and another a garden in Kakurgachee, and also some articles of jewellery.

The plaintiff, Brijnauth, claimed these title deeds and jewellery as heir to his father, Chutterbhooj, who was a first cousin of the defendant; and the properties to which the title deeds belonged were held under two distinct titles. The house No. 75, Burtollah Street, had been admittedly purchased many years ago by a person called Kissen Doss, who was a cousin of both the parties to this suit; and it is admitted that it was purchased with Kissen Doss's separate funds. In July 1835, Kissen Doss, by lease and release, conveyed this house to his wife, Gunga Coomaree, and the alleged consideration for the conveyance was certain jewellery belonging to her which was made over to him at the time of the conveyance. On the 25th of September 1852, Gunga Coomaree conveyed this house by a deed of gift to Chutterbhooj, who was then a young man of twenty or twenty-five. She had no children of her own, and it appears that she had taken charge of Chutterbhooj, and treated him, according to the evidence, as her own son. After this Chutterbhooj received, for a time at any rate, the rents of the property; and in a will, which Gunga Coomaree made on the 9th of August 1859, seven years after the deed of gift, she distinctly recognised the deed and confirmed it.

There is no doubt as to the due execution of either of the above deeds; and the learned Judge in the Court below has come to the conclusion that they were both *bonâ fide* conveyances, and that the deed of gift was intended to pass, and did pass, the property to Chutterbhooj. The defendant contends, on the other hand, that both the conveyance from Kissen Doss to Gunga Coomaree, and the deed of gift from Gunga Coomaree to Chutterbhooj, were *benami* transactions, and that he, as being the nearest male relative of Kissen Doss, is his heir and entitled to the property after Gunga Coomaree's death.

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In this contention Gunga Coomaree appears, now disposed to assist the defendant. Chutterbhooj it seems behaved badly towards the latter part of his life, and got into debt; and Gunga Coomaree now says that the deed of gift was a *benami* transaction, and that she never intended Chutterbhooj to have the property for his own. But she has never taken any steps to set aside the deed of gift, and until she has done so, we think the plaintiff must clearly be considered for the purposes of this suit, as the present owner of the property.

The defendant's case is, that, after Chutterbhooj's death, the title deeds were handed by Gunga Coomaree to him, with a view to the house being dedicated to a Thakoor. But no actual dedication has taken place, and we think that the defendant, even assuming that his own account is true, is bound to give up the deeds to the present owner of the property. It must be borne in mind that Gunga Coomaree is no party to this suit, and that our judgment will not affect her rights or be a bar to any suit which she may bring for the purpose of setting aside the deed of gift.

As regards the garden in Kakurgachee, that appears to have been purchased by Chutterbhooj after Kissen Doss's death in 1849. It was undoubtedly conveyed to him, and he has been the apparent owner of it from that time. In 1868, he mortgaged it for Rs. 1862-6-0 to Gunga Coomar Dutt; and upon that mortgage Gunga Coomar afterwards obtained a decree against Chutterbhooj in the year 1873. Chutterbhooj and his wife were at that time staying away from Calcutta, and it appears that, for the purpose of preventing the property being sold in execution, Gunga Coomaree applied to the defendant, at Chutterbhooj's instance, to pay the amount of the decree. The defendant agreed to do this upon having the title deeds of the garden, and also the jewellery which was in Chutterbhooj's possession, handed over to him by way of security; and in an account which was afterwards rendered by him to Chutterbhooj, and which is made an exhibit to the plaint he (the defendant) debited Chutterbhooj with the sum of Rs. 2,689-6-0 as being the amount of principal and interest due to him in respect of the advance, while on the credit side of the account he admits that he holds as

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Chutterbhooj's property, first, the title deeds of the garden; and secondly, the jewellery which is sought to be recovered in this suit, both of which were deposited with the defendant at the time of the advance.

The defendant now says, that the jewellery did not belong to Chutterbhooj, but to his wife; and that the garden, although conveyed to Chutterbhooj, was bought with Kissen Doss's money, or with the proceeds of the house No. 75, Burtollah Street. But if Chutterbhooj's wife allowed him to deal with the jewellery as his own, and if the defendant received it as being Chutterbhooj's property, (as it is clear from the above account that he did,) he cannot possibly resist the plaintiff's claim for it in this suit; and with regard to the title deeds of the garden, it is equally clear, that as between plaintiff and defendant, the latter having received them from Chutterbhooj, cannot set up the title of a third party, especially as the plaintiff is the ostensible owner of the property.

The defendant then contends, that although, as between him and the plaintiff, the property in the title deeds to the garden and in the jewels may be in the plaintiff, he has a right of lien upon them for the amount advanced with interest, and that he can set up that right as a valid defence to this suit. But we quite agree with the learned Judge in the Court below that the course which the defendant has taken precludes him from setting up his lien as a defence. In order to avail himself of such a defence, he should have been in a position to show that at the commencement of this suit he was ready to give up the property upon being paid the amount of his lien, (see *Boardman* vs. *Sill*, 1 Camp., 410; *Dirks* vs. *Richards*, 4 M. and Gr. 574), but it is clear that he was not ready to do this because he has distinctly denied and contested the defendant's title to the property.

Another objection, which perhaps we ought to notice, was taken by the defendants' counsel to the jurisdiction of the Court to try this suit. He contended that, as the garden in Kakragachee was situated out of the Calcutta jurisdiction, a suit for the title deeds relating to it was a "suit for land" within the meaning of section 12 of the Charter, and consequently, that as leave to bring the suit had been obtained under section 12, the Court could not entertain it. We think, however, that there

nothing in this objection. A suit to recover title deeds, although it may involve a question of title, is not a suit to obtain possession of land, or to deal in any way with the land itself, within the meaning of the Charter.

Then another objection, which was taken to the decree in the Court below, was, that interest on the Rs. 1,862-6-0, had been allowed to the defendant only up to the date of the plaint, and that it ought to have been allowed up to the time when the debt would be actually paid. But we think that in this respect also the learned Judge in the Court below was quite right. The plaintiff says that he actually tendered the money due to the defendant before the suit, and if he could have proved this satisfactorily, the defendant would only have been entitled to interest up to the time of the tender. But as there is no sufficient proof of this, the defendant is entitled to interest up to the time when the plaintiff can show that he was ready to pay the debts. Now the plaintiff distinctly offers in his plaint to pay the defendant all that was due up to that date, provided the property were given up, and if the defendant had accepted that offer, there would have been an end of the suit. But instead of doing this, the defendant denied the plaintiff's title, and said in effect, that however ready the plaintiff might be to pay the money on those terms, he, the defendant, would not receive it, but insisted on retaining the deed and jewels on the strength of an adverse title. Under these circumstances, we think the defendant is only entitled to interest up to the date of the plaint, and we therefore affirm the decree of the Court below, and dismiss the appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1878 June 19th. No. 11 of 1877.

KHAJAH AHSANULLAH . . . . . PLAINTI

AND

AFTABUDDIN MAHOMED . . . . . DEFEND

Interest—Enhancement—Arrears of Rent—Notice.

Plaintiff (landlord) served a notice on the defendant (tenant) requ him to pay rent at an enhanced rate. The defendant refusing, a sui brought, and a decree obtained for enhanced rent of the year 127 the basis of the notice. While this case was pending, plaintiff brou suit for the rent of 1279, and obtained a decree with interest fro date of the decree, in the former suit—the first decree obtained fo at the enhanced rate. *Held*, that plaintiff was entitled to interest the time the rent for the year 1279 became due.

Doyamoyee Chowdhraines vs. *Bholanath Ghose*, 6 W. R., Act X., ings, 77, cited and followed; *Raj Mohun Neogee* vs. *Anund Ch Chowdhry*, 10 W. R., 166, dissented from.

REGULAR APPEAL from a decree passed by the Subord Judge of Tipperah.

Plaintiff brought a suit for enhanced rent of the year pursuant to notice, and obtained a decree on the 21st of A 1876. While that suit was pending, the present suit was, o 10th of April 1876, brought for the rent of 1279, on the basis, with interest from the date on which it became due. Subordinate Judge gave a decree allowing interest from the on which the decree for assessment of rent for 1278 was pass the Court. The plaintiff appealed.

H. Bell, for Appellant. Baboo *Chunder Madhub Ghose*, *Doorga Mohun Doss*, and Baboo *Mohiny Mohun Roy*, fo pellant.

Baboo *Srinath Doss*, and Moonshee *Serajul Islam*, for pondent.

The judgment of the High Court (1) was delivered by

MACLEAN, *J.*

MACLEAN, *J.*:—

In this suit the plaintiff asked for Rs. 5,196-4-8, arre rent with interest for 1279, having served defendant w

(1) MITTER and MACLEAN, *J.J.*

notice to pay Rs. 3,696-0-3, annual rent, in the latter part of 1277. A suit for rent for 1278, at the rate fixed in the notice, was brought in 1872, and we have recently decided in our decision in special appeal No. 68 of 1877, that defendant is liable for Rs. 2,823-6-0. That decision will govern this suit in respect of the actual rent due for 1279.

The only question arising in this appeal which requires a separate decision is, whether plaintiff is entitled to any interest, and if so, from what date. The Subordinate Judge has refused to allow interest prior to determination of the suit, and he supports his refusal by a decision of this Court reported in 10 W. R., 166—*Raj Mohun Neogee* vs. *Anund Chunder Chowdhry*. We think that that decision is not in accordance with the principles laid down in the Full Bench decision in 6 W. R., Act X. Rulings, 77—*Doyamoyee Chowdhrainee* vs. *Bholanath Ghose*. There the principle laid down is, that the non-payment of the rent at the enhanced rate constitutes the cause of action, or in other words an arrear of rent, liable for interest, does not depend upon the date of decree, but upon the date upon which it became due.

When a tenant is called upon by notice to pay an enhanced rate of rent, he has more than one course open to him. He can take the initiative and complain of excessive demand of rent, or he can contest his liability to pay what is asked for in answer to a suit, but whichever course he adopts, and whatever the result of his contention, the rent adjudged to be due is none the less an arrear if not paid when due. The amount of rent is fixed by the notice, and if the tenant neither pays that amount at the appointed time nor succeeds in showing that it is an unjust demand, he is properly liable for the consequences of his failure to pay in due time, namely, for interest.

We, therefore, consider the Subordinate Judge's decision erroneous, and decree this appeal with proportionate costs. The plaintiff is entitled to interest at twelve per cent. on the instalments of rent as they fell due up to this date, and we allow interest at six per cent. on the amount of this decree till realiza-

[CIVIL APPELLATE JURISDICTION.]

1878
July 26th.

No. 528 of 1878.

RAJBOLLOBH SEN AND OTHERS . . . . DEFENDANTS

AND

OMESH CHANDRO ROOJ . . . . . PLAINTIFF.

Gift by Hindu Widow—Widow—Next heir, Concurrence of—Title—Reversioner.

A gift by a childless Hindu widow of the estate left by her deceased husband, made with the concurrence of the next heir then living, passes a valid title to the property.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Beerbhoom, modifying that of the Moonsiff of Bonepore.

The material portion of the judgment referred to is as follows:—This appeal relates to five gardens. It is admitted on both sides that an 8-anna share of them belonged originally to one Dwarka Nath Sen. It has been found by the lower Court—and it is not denied by the lower Court—that Pearimoni Dassi, the widow of the said Dwarka Nath Sen, made a gift of that share to the plaintiff with the consent of one Bisseswar Sen, the father of the appellants Nos. 1 to 4, and the only reversionary heir of Dwarka Nath Sen, at the time of that gift. Some time after that gift Bisseswar died, leaving four sons, appellants Nos. 1 to 4. Subsequently Pearimoni died in Pous 1279. The appellants contend that they are not bound by that gift or by the consent of Bisseswar when they do not claim the properties through him. I am of opinion that the gift is valid and plaintiff's title is complete, when the gift was made by the widow Pearimoni Dassi with the consent of her husband's only reversionary heir, the father of the appellants Nos. 1 to 4—*Callychund Dutt* vs. *Moore*, Fulton 76; *Sreemutty Jadomoney Dabey* vs. *Saroda Prosonno Mookerjee* 1 Boulnois, 120; *Gunga Pershad Kur* vs. *Sumbhoonath Burman* 22 W. R., 393.

The defendants appealed.

Baboo *Taruck Nath Sen*, for the Appellants.

Baboo *Nil Madhub Sen*, for the Respondent.

The judgment of the High Court (1) was delivered by

JACKSON, *J.*:—

It appears to me that the judgment of the lower Appellate Court is right upon the point raised.

I would hold the defendants to be concluded, not upon the ground that they are bound by the Act or consent of the father, through whom, they say, they do not claim, but upon this ground that the act of the widow sanctioned by the concurrence of the then next heir and ever since was in itself a valid grant.

This, so far as I know, is the rule usually acted upon by the Court in Bengal; and, although in a case reported in 22 W. R., 393—*Gunga Pershad Kur* vs. *Sumbhoonath Burmun*, reference is made to some conflict of opinion upon the subject, I am not aware there is such authority opposed to the view which I take as to oblige us to refer this question to the decision of a Full Bench. I would, therefore, dismiss this appeal with costs.

(1) JACKSON and TOTTENHAM, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

1878 *July 5th.*

No. 142 of 1878

RAM DOYAL BAJPIE . . . . . DEFENDANT;

AND

HEERA LALL PARAY . . . . . PLAINTIFF.

Oral Evidence—Admissibility—Document, Evidence to contradict—Evidence Act I of 1872, *section* 92.

A, by a deed of sale absolute on its face, transferred certain land to B for the sum of Rs. 379. A alleged that at the time the transaction was entered into it was understood and orally agreed that the sale was merely by way of security for the payment of Rs. 400 due to a third party, C, under a compromise made by A with C for the satisfaction of a decree for Rs. 832, which the latter held against A; and that it was at the same time orally agreed between A and B that on the payment of the money by A to C the deed of sale should be delivered to the former. Subsequently A brought a suit against B for the return of the *kobala*, alleging that the whole of the money had been paid to A. *Held*, that section 92 of the Evidence Act, I of 1872, prevented the admission of evidence of the oral agreement to contradict the deed of sale which had admittedly been contemporaneous.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of East Burdwan, reversing that of the Moonsiff of Budh-Budh.

The facts of the case are as follows:—

On the 30th of July, and the 6th of October 1874, Keshob Lall obtained two decrees against Heera Lall Paray, the plaintiff in the present suit, the aggregate amount of which was Rs. 832-8. On the 5th of March 1875, Heera Lall Paray, by an absolute deed of sale, conveyed certain land to Ram Doyal Bajpie for a consideration of Rs. 799. Heera Lall Paray alleged that Keshob Lall had agreed to take Rs. 400 (to be paid by instalments) in satisfaction of the amount of his two decrees, and that in order to secure the repayment of the Rs. 400 it was arranged that the land should be conveyed to Ram Doyal Bajpie, who would reconvey when the Rs. 400 should be fully paid to Keshob Lall. On the 9th of December 1876, the present suit was filed by Heera Lall Paray, alleging that the Rs. 400 was paid off; that nevertheless

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Judgment.

Keshob Lall was about to execute the decrees, and that he prayed for a return of the *kobala* (he had always retained possession of the land,) and for an injunction to restrain Keshob Lall from executing the decrees. Both Keshob Lall and Ram Doyal Bajpie denied all knowledge of the arrangement alleged by the plaintiff. Keshob Lall denied that his decrees were satisfied, and Ram Doyal Bajpie asserted the sale of the land to him was, as it appeared to be, absolute, and that he had paid the consideration, namely, Rs. 799.

The Court of First Instance dismissed the suit on the authority of *Banapa* vs. *Sundardas Jagjivandas*, I. L. R., 1 Bom., 333, and section 92 of the Evidence Act. This decision was reversed on appeal. The defendant Ram Doyal then brought this special appeal.

Baboo *Bungshee Dhur Sen*, for Appellant.

Baboo *Nil Madhub Sen*, for Respondent.

The judgment of the Court (1) was delivered by

JACKSON, *J.* :—

JACKSON, *J.*

The defendant, Keshob Lall, had two decrees against the plaintiff Heera Lall, one for Rs. 397-9-0, the other for Rs. 434-15-0, in all Rs. 832-8-0. Heera Lall says that at the intercession of respectable people, Keshob Lall agreed to accept in full satisfaction Rs. 400 payable by instalments, but that as collateral security he (Heera Lall) was required to execute a *kobala* selling his immoveable property, which instrument was to remain, till payment was made, in the custody of the defendant Ram Doyal, a person related to both parties; that the *kobala* was executed, registered and made over accordingly—the lands purported to be conveyed remaining, however, in Heera Lall's possession; that he had paid by degrees the whole amount of Rs. 400 to Keshob according to agreement; that Keshob, notwithstanding, was proceeding to execute the before mentioned decrees. He, therefore, asked for the double relief that Keshob Lall should be restrained from executing his decrees, and that Ram Doyal should be ordered to restore the *kobala*.

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Judgment.

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Both defendants answered, though the written statement of Ram Doyal alone has been printed. Keshob denied that he entered into any such compromise, and averred that Heera Lall had, with his consent, obtained time for payment, promising to make some arrangement, but had made none; and that he had shown constant bad faith. He pointed out that no adjustment made without notice to Court could be recognized, and denied that he had received anything in satisfaction of his decrees. Ram Doyal, in whose favour the *kobala* was executed, said in his written statement that the allegations of the plaint were entirely false, that he had nothing to do with the arrangement between the plaintiff and Keshob Lall; that the plaintiff had sold the property to him, for the consideration specified in the bond; that he had obtained possession and still kept it, except that he had sold one part of the land to one Jogeshur, who had a prior mortgage on it and some other portions to other people. He also pointed out the legal objections to such a suit proceeding, and denied that plaintiff had any cause of action of that sort, though he might possibly bring a suit of a different kind. He filed the *kobala* made in his favour which is duly registered.

The Moonsiff was of opinion, following a case in the Indian Law Reports, 1 Bombay, page 333, that his Court was restrained by section 92 of the Evidence Act from receiving evidence of the alleged oral agreement, for which reason the suit as to the *kobala* must fail, and as to the execution he held, that, being prohibited by section 206 from recognizing any adjustment not made through or certified to the Court, he was compelled by section 217 to proceed with the execution, and that consequently that branch of the suit failed also. He, therefore, dismissed the suit altogether, but as the defendant Keshob, when cited to give evidence, had declared that he would not attend, the Moonsiff punished his contumacy by refusing to give him his costs.

The plaintiff appealed, and the appeal came before the Officiating Second Subordinate Judge of Burdwan. This Judge concurred with the Moonsiff as to that part of the plaint which asked for stay of execution. Besides the sections of the Code relied on by the Moonsiff he referred to section 11 of Act XXIII of 1861 as prohibiting regular

he determination of matters properly arising in execution ree. He then went on to consider whether plaintiff could ain the suit for the purpose of getting back his *kobala*. ought the Bombay case distinguishable from the present, uch as the Court was not called upon (he thought) in ase to decide any dispute as to the property conveyed or the nature of the instrument. If such duty had been ed upon the Court he said that he would have agreed with .oonsiff on this part of the case likewise. The view he of it was this:—"The plaintiff's case was, that the docu- could not be operative, inasmuch as the consideration y did not pass, and that it was executed in pursuance of al agreement, that it should be returned to the plaintiff on as he would perform his part of the agreement by ent of the decretal amount. I would look upon this nent as a valuable deed pledged for some special purpose, the question whether the plaintiff would be entitled to it returned to him depends upon the fact whether the act in accordance with which it was delivered has been med by him. The plaintiff's case was, that the document be inoperative if a verbal contract entered into by him performed, and I presume that proviso 3, section 92 of vidence Act, permits the admission of oral evidence in cases." He then set out the proviso in question, and gave inion that the case clearly came within its terms, con- ng the plaintiffs to set up an agreement that in a certain the document should be inoperative. Taking this view case, he directed a remand in order to the taking of evi- as to the alleged agreement.

defendant Ram Doyal at once appealed to this Court, and ra now to determine whether the latter part of the Subor- Judge's decision was correct. The words of section the Indian Evidence Act are as follows:—"When the of any such contract, grant or other disposition of pro- or any matter required by law to be reduced to the form of a nt have been proved according to the last section, no of any oral agreement or statement shall be admitted een the parties to any such instrument or their repre-

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sentatives in interest for the purpose of contradicting, va adding to, or subtracting from its terms." In the case b us, the terms of the contract of sale between the plainti the defendant Ram Doyal are proved by a written instrum which those terms are embodied, the execution thereof admitted.

To this section there are six provisoes, of which only tw third and the fourth, can have any reference to the present The third, which the lower Appellate Court has applied, templates the case of a "separate oral agreement constituti condition precedent, &c.," and the fourth relates to di "subsequent oral agreement to rescind or modify, &c." the plaintiff desires to prove is, neither the existence of a c tion precedent nor any distinct subsequent agreement, but a temporaneous unwritten agreement that the *kobala* to A s merely serve as a security for the protection of B, till the ment of a debt by C, the executant.

It appears to us that this was precisely what the law int to forbid, and precisely the case before the Bombay High (The fact that in that case the vendee sued on his *kobal* the agreement was set up by way of defence, makes no difference. The Court could not regard the present s appellant as a mere depository, nor could the contract be l upon as anything but a sale, unless the Court let in the evi of the oral agreement which section 92 expressly excludes.

In our opinion, therefore, the conclusion at which the l siff arrived was right, and the lower Appellate Court whic versed his decision was in error.

It well illustrates the mischief which would result fro mitting such a suit as the present that the vendee appe have sold his rights to a third person. When it is th necessary to have recourse to such instruments for mere poses of security, the usual and proper course is to take the party, in whose favour the deed is executed, a formal w acknowledgment of the purpose for which it is done, and being bound to re-convey—a formality which when the l has been registered is absolutely indispensable. The ap allowed with costs.

[CIVIL APPELLATE JURISDICTION.]

PROSONONATH ROY CHOWDHRY . . . PLAINTIFF;

AND

AFZOLONESSA BEGUM . . . . . DEFENDANT.

1878 *August* 14*th*.

No 2360 of 1877.

Limitation—Setting aside mourosi lease—Alienation by Guardian—Guardian—Minor.

On the 7th of May 1847, a Hindu widow, acting as guardian of her infant son, gave a *mourosi* lease of certain premises to the defendant. The son died a minor and unmarried, and the widow, under a power, adopted the plaintiff in his stead. The widow died in 1861. The plaintiff came of age on the 10th of February 1872, and on the 8th of February 1875, instituted a suit for the purpose of setting aside the *mourosi* lease. *Held*, that the suit was not barred by limitation.

Hunooman Pershad Panday vs. *Mussamut Bahori Munraj Koonwaree*, 6 Moore's Ind. App., 393, cited and followed; *Gobindo Nath Roy* vs. *Ram Kanay Chowdhry*, 24 W. R., 183; and *Gobindo Coomar Chowdhry* vs. *Huro Chunder Chowdhry*, 7 W. R., 134, cited and distinguished.

APPEAL from an appellate decree passed by the Judge of Mymensingh, affirming that of the Subordinate Judge of that District.

This was a suit to set aside a *mourosi* lease granted to the defendant by Umatara Chowdhranee, the adopted mother of the plaintiff. Kalinath Roy, the owner of the property leased, died in Bhadro 1251, (August—September 1844), leaving a widow, Umatara Chowdhranee, and a minor son, Gobindo Doss Roy, him surviving. On the 25th of Bysack 1254, (7th May 1847), Umatara granted a *mourosi* lease of the premises in question to the defendant. In Bhadro 1262, (August—September 1855), Gobindo Doss Roy died, a minor and unmarried; and in Assar 1265 (June—July 1858), Umatara, in pursuance of a power given to her by her husband Kalinath Roy, adopted the plaintiff. Umatara died in Pous 1268, (December 1861—January 1862), and the plaintiff came of age on the 10th of February 1872. On the 8th of February 1875, he instituted the present suit for the purpose of setting aside the *mourosi* lease.

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The Moonsiff dismissed the suit on the ground that the plaintiff had not brought his suit within three years of attaining his majority—Act IX of 1871, section 7. On appeal, this decision was upheld on another ground, namely, that the cause of action arose when the defendant took possession under the lease, and therefore the suit was barred under the general law of limitation—*Gobind Coomar Chowdhry* vs. *Huro Chunder Chowdhry*, 7 W. R., 134.

The plaintiff appealed to the High Court.

Baboo *Mohiny Mohun Roy*, and Baboo *Nilmadhub Bose*, for Appellant.

Baboo *Srinath Doss*, and Baboo *Nullit Chunder Sen*, for Respondent.

The judgment of the High Court (1) is as follows :—

In this case the plaintiff's suit has been dismissed by the Courts below as barred by limitation. The facts found by the lower Appellate Court are these : The property in dispute originally belonged to one Kalinath Roy, who died in Bhadro 1251, survived by his widow Umatara and an infant son Gobind Doss. In 1254, Umatara executed in favor of the defendant a *mourosi* ijara of the property in suit. In this document she does not describe herself as guardian or mother of Gobind Doss. But the District Judge is apparently of opinion that it was executed by Umatara as guardian of Gobind Doss. In this opinion, we think he is right (*See Hunooman Pershad Panday* vs. *Mussamut Bahori Muraj Koonwaree*, 6 Moore's Ind. App., 393.)

Gobind Doss died before attaining majority in Bhadro 1262, and, under an *Unoomutti Putro* executed by Kalinath before his death, the plaintiff in this case was adopted by Umatara in Assar 1265. Umatara died in Pous 1268. The plaintiff, attaining his majority on the 28th Magh 1278, has instituted this suit within three years on the 27th Magh 1281, to set aside the *mourosi* ijara pottah granted to the defendant by Umatara in 1254.

The District Judge is of opinion that the suit is barred by limitation, because the cause of action accrued to Gobind

(1) MITTER and MACLEAN, *J.J.*

when the property was alienated in the year 1254 and possession taken by the defendant, and therefore time having once begun to run against Gobind Doss, the subsequent disability of the plaintiff could not, under section 9 of Act IX of 1871, save the case from operation of the law of limitation.

We are of opinion that the District Judge is not right in taking this view of the law. The cause of action did not accrue to Gobind Doss, who was a minor at the time of the alienation, and died before attaining majority. An alienation of a ward's property by the guardian or manager is not void *ab initio*, but voidable by the ward on attaining majority. Although Act XV of 1877, the new Limitation Act, is not applicable to this case (it being governed by the Limitation Act of 1871), yet article 44 of the second Schedule of that Act may be referred to in support of the view that, in a case like the present, the cause of action does not accrue to the minor during his minority. The time, therefore, did not begin to run against Gobind, who died a minor.

The District Judge, in support of his view, refers to *Gobindo Coomar Chowdhry*, 7 W. R., 134; but in that case, the guardian was dispossessed from a portion of his ward's property, therefore the cause of action accrued when wrongful possession was taken by the defendant. That case, therefore, cannot apply to the facts of this case.

In the course of argument a case from 24 W. R., 183 *Gobindo Nath Roy* vs. *Ram Kanay Chowdhry*, was relied upon by the defendant's pleader, but that case is also distinguishable. There the alienation by the mother of the plaintiff, adopted son, was made, not in the capacity of a guardian of any infant, but in her capacity of a Hindu widow. The suit was brought in the lifetime of the widow. The cause of action to set aside an alienation by a Hindu widow during her lifetime accrues from the date of the alienation. A separate right to the reversionary [illegible], viz., the right to immediate possession, arises upon the death of the widow.

In this case the facts are entirely different. The suit is to set aside an alienation of a guardian by a person who occupies the same position as the ward for whom the guardian acted at the

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Judgment.

time of the alienation. This suit has been also brought for immediate possession after the death of the plaintiff's adoptive mother. We think, therefore, that the cause of action in this case arose on the plaintiff's attaining majority. The suit having been brought within three years from that date is within time.

If it be supposed that the alienation in this case was made by Umatara as a Hindu widow, then the cause of action would arise on her death; and, as at that time the plaintiff was a minor, the present suit is also within time under section 7 of Act IX of 1871.

It has been further contended that the defendant took possession of the property in suit under an alienation made by Umatara who was an utter stranger to it. Upon the finding of the lower Appellate Court, it is not open to the defendant's counsel to contend for this view of the case. But, allowing the defendant to put forward this view of the *mourosi* ijara of 1254, still the suit does not seem to us to be barred by limitation.

Upon the facts found, the property in dispute on Gobind's death devolved upon Umatara. Therefore, the ijara pottah, which she executed as an unconcerned party in 1254, had the force and effect of an alienation so far as her rights were concerned, the moment she succeeded to the property. Therefore, in this view of the case also, the defendant having been in possession since Bhadro 1262, that is, the death of Gobind Doss, as an alienee of a Hindu widow, the cause of action to the next reversioner for possession of the property accrued on the widow's death, when, as already stated, the plaintiff was a minor.

The plaintiff's claim is, therefore, not barred by limitation. We reverse the decree of the lower Appellate Court, and remand the case for re-trial to that Court. Costs to abide the result.

[CIVIL APPELLATE JURISDICTION.]

ODHARI SINGH . . . . . PLAINTIFF;

AND

LA SEWSARUN LAL AND OTHERS . . . DEFENDANTS.

1878
August 28th.

No. 1921 of 1877.

judicata—Cause of Action—Mortgage money, Suit for—Possession, Suit for—Act VIII of 1859, *section* 2—*Act VIII of* 1859, *section* 7.

The first defendant mortgaged certain lands to plaintiff by way of *zuripeshgi* lease, under which the latter entered into possession. The first defendant afterwards gave a *ticca* of the lands to the second defendant, who turned the plaintiff out of possession before the term of the *zuripeshgi* lease had expired. Plaintiff then sued the first and second defendant, basing his cause of action on the dispossession by the second defendant, and praying for the recovery of the mortgage money by a sale of the mortgaged property. The suit was dismissed, the Judge observing that plaintiff's proper remedy was to bring a suit for possession. Plaintiff then brought a subsequent suit for possession against the same parties, and on the same cause of action. The defendants objected that the suit was barred under sections 2 and 7, Act VIII of 1859, but the contention was overruled.

ECIAL APPEAL from a decree passed by the Judge of , affirming that of the Subordinate Judge of that District.

aboo *Mohesh Chunder Chowdhry,* for Appellant.

loonshee *Mahomed Yusoof,* for Respondents.

e facts of the case are sufficiently set forth in the marginal , and in the following judgment of the High Court (1) :—

appears to us that this suit was not barred either by section section 7 of Act VIII of 1859. What happened was, that plaintiff, setting up the same state of facts as are now relied , sought in the previous suit to obtain a relief to which Court held he was not entitled. That suit was accordingly issed, with an indication of the Court's opinion that the facts entitled him to a remedy of a different kind. This

(1) JACKSON and TOTTENHAM, *JJ.*

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DEODHARI SINGH v. LALA SEWSARUN LAL.

Judgment.

suit accordingly was brought, and it would certainly be hard on the plaintiff if his second suit should be dismissed, because he has taken the course pointed out to him on dismissal of his first suit. We think that the same cause of action has not been tried and determined in the sense of seeking for a particular relief upon particular facts. No doubt in such a case the better mode would be, that if it appeared to the Court on examining the plaint and questioning the plaintiff that the plaint was improperly framed, it should be returned for the purpose of correction, so as to enable plaintiff to apply for the true remedy. But that has not been done in this case. The plaintiff, therefore, was fairly entitled to have his case fully tried out. The judgment of the lower Appellate Court must be set aside, and the case remanded to that Court for trial. The costs will abide the result.

[CIVIL APPELLATE JURISDICTION.]

Sept. 11th.

No. 13 of 1878.

LALA KALI PERSHAD . . . . . PLAINTIFF;

AND

BULI SINGH AND ANOTHER . . . . . DEFENDANTS.

Lis Pendens—Purchaser under Money-decree—Decree declaring lien—Mortgage Decree—Right of Redemption.

Defendant, in execution of a money-decree, obtained by him against A in 1872, sold certain property belonging to A on the 10th of September 1874, became himself the purchaser, and entered into possession. In the meantime, on the 10th of July 1874, a person to whom this property had been mortgaged in 1872, brought a suit on his mortgage, and on the 17th of September obtained a decree declaring his lien; in execution of this decree the mortgaged property was sold to the vendor of the plaintiff on the 23rd of February 1875. In a suit for possession, *Held*, that the defendant was bound by *lis pendens*; that, therefore, the plaintiff was entitled to a decree for possession; and that the defendant could not claim to hold the land subject to the mortgage.

APPEAL from an appellate decree passed by the Judge of Bhaugulpore, affirming that of the Moonsiff of Beguserai.

Baboo *Chunder Madhub Ghose*, for the Appellant.

Paul (Advocate-General), for the Respondent, Baboo *Mohun Mohun Roy*, with him.

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he facts of the case are sufficiently set forth in the marginal note in the judgment of the High Court (1). In regard to the ution proceedings, which ended with the sale of the 7th of ember 1874, no date except the latter appears in the paper-book.

he judgment of the High Court was as follows :—

this appeal there are two points for decision :—*First*, whether ot the doctrine of *lis pendens* applies to the case ; and, *second*- it does apply, whether the defendant can escape the effect on the plea that he had no notice of the proceedings taken xecution of the decree obtained by the mortgagee of the erty in which the subject of the present dispute is included. lower Appellate Court held that the doctrine of *lis pendens* not apply. We are of opinion that in so holding the District e was in error. The defendant, respondent, purchased the erty, or rather the right and interest in it of his debtor, at le in execution of his own decree, on the 7th of September . At that time there was pending in the same Court a suit nst the same debtor brought by his mortgagee to recover a secured by the mortgage of property, which included that in dispute. And on the 17th of September a decree was d in that suit, ordering the amount to be recovered by the of the property. It seems clear that the defendant having, he 7th, bought the mortgagor's right and interest *pendente lite*, ired nothing more than the equity of redemption, and did not ire the land free of the encumbrance created by the debtor. thority be required for holding that a purchaser under such umstances is bound by *lis pendens*, we would only refer to the g of the late Chief Justice of this Court, Sir R. COUCH, in the of *Rajkissen Mookerjee* vs. *Radha Madhub Holdar*, reported 1 W. R., 349, in which decision we concur.

he other question is as to the defendant's being entitled to ice of the proceedings in execution of the decree establishing mortgage lien. It has been argued that, as he was not made rty to those proceedings, they cannot operate to his prejudice. we find that the defendant, by his own conduct, made it im- ble for the mortgagee decree-holder to be aware that he

(1) JACKSON and TOTTENHAM, *J J.*

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claimed any interest whatever in the mortgaged property; for the defendant in execution of his own decree caused the attachment and sale of the premises, which he himself purchased at that sale, describing them as *lakheraj* property. Now there was no *lakheraj* property included in the mortgage, and it is now admitted that this was a misdescription. This misdescription was quite sufficient to relieve the mortgagee decree-holder of the obligation, if any had existed, of giving the present defendant notice of his proceedings in execution.

We are, therefore, of opinion that the defendant has no right to maintain possession as against the plaintiff, whose title is derived from the sale held in accordance with the decree obtained by the mortgagee. The judgments of the lower Courts must be reversed, and the appellant will have a decree for possession with all costs, and interest at six per cent.

[CIVIL REFERENCE.]

August 6th.

No. 7 of 1878.

BIDDOMOYE DABEE CHOWDHRANEE . . PLAINTIFF;

AND

SITTARAM AGURWALLAH AND TOOBUL DOSS MULLICK . . . . . DEFENDANTS.

Contract Act, section 178—Possession of Goods—Servant in charge of House—Trover—Pawnbroker—Pledge of Goods.

The owner of a house, on leaving Calcutta, left a jemadar in charge of her house and property there, as her servant. During her absence, the jemadar removed some valuables from the house and pawned them. *Held*, that the owner could recover in trover against the pawnbrokers, as the goods had not been in the "possession" of the pledgor, within the meaning of section 178 of the Contract Act. *Held*, also, that, even supposing the articles were in "possession" of the jemadar within the meaning of section 178 of the Contract Act, yet the case came clearly within the proviso to that section.

Greenwood vs. *Holquette*, 12 B. L. R., 42, cited and followed.

REFERENCE for the opinion of the High Court under section 7 of Act XXVI of 1864, and section 55 of Act IX of 18[illegible] by the First Judge of the Calcutta Court of Small Causes. The case is stated as follows :—

"These two cases have been brought in trover—the former for Rs. 501, and the latter for Rs. 194. By consent of all parties concerned they have both been heard together, as both arise out of the same subject-matter. So far as I can judge, the defendants are in no way connected with one another.

"The plaintiff is, apparently, a lady of some property, having a country-house in the District of Mymensingh, and a lodging house in Calcutta. Her affairs are managed in Calcutta, partly by her brother Denobundo Sandel, and partly by her cousin Chunder Nath Sandel. The plaintiff left Calcutta for her country-house about Joisto 1284 (June 1877), and returned about the end of Maugh (February 1878) of the same year. When she went away, her jemadar, Sheoruttun Tewary, was left in charge of the Calcutta house.

"Sheoruttun Tewary had been known to the plaintiff for some years, and had been brought by her from her country, and placed as a jemadar at the Calcutta house, he having been previously in some way connected with her in her country. He was a trusted servant, and it is in evidence that from time to time he advanced small sums amounting to Rs. 14, in order to pay household expenses, when they were short of funds at the Calcutta house.

"When the plaintiff left Calcutta, the articles in question were in a box in a room of the Calcutta house, the key of which room was left with Sheoruttun Tewary. It is further alleged that the articles were placed in the box by the plaintiff herself, and that she, having locked the box, took the key away with her to the country. This is stated to be the case by Denobundo and Chunder Nath, but the plaintiff herself has not been examined, and there is no evidence to show in what state the box was on the plaintiff's return from the country. On her return, it was ascertained that the articles in question were missing, and Denobundo accordingly laid a charge at the Thannah. The entry there states that it was theft, and that the offence was under section 381 of the Indian Penal Code, but that is apparently the Inspector's view of the matter.

"An investigation was then made by Inspector Swan, and the articles were found in the possession of the defendants, the

[illegible] defendant [illegible] being in possession of the more valuable [illegible]nes.

Subsequently, Sheoruttun Tewary was, on the 4th March [illegible], charged before the Chief Magistrate of Calcutta as follows:— That you on a certain day or days, between May 1877 and February 1878, in Calcutta, being entrusted with two silver ornaments and [illegible] silver vessels, value in all Rs. 672, as a servant committed a criminal breach of trust in respect thereof, whereby you have committed an offence under section 408 of the Indian Penal Code. He was found guilty on his own admission and sentenced to six months' rigorous imprisonment, while the property was ordered to be restored to where it was found. Not only was Sheoruttun Tewary convicted of criminal breach of trust as a servant, but the letters written by the plaintiff's attorney to the respective defendants also state that Sheoruttun was entrusted with the articles in question. Under such circumstances, I am not prepared to say that the key of the box in which the articles were kept was taken by the plaintiff herself, the more especially as I have not the least evidence with regard to this point. I must consider then that Sheoruttun was entrusted with the articles, and that he did not commit theft in respect of such articles as it is now suggested.

"Inspector Swan states, that during the investigation both defendants were straightforward in their conduct; that they immediately admitted that they had got the articles and offered to show him their books; and that they also stated, Sheoruttun had pledged the various articles with them, stating that his mistress was in want of money to pay the rent of her Calcutta house. So far, then, the defendants are relieved from any charge which may be laid against them, in respect of matters which might come within the first proviso of section 178 of the Indian Contract Act, it not being unusual for *purda-nasheen* ladies to entrust their jemadar with valuable articles for the purpose of raising money.

"The whole question turns upon the meaning of section 178 of the Indian Contract Act. By that Act, Acts XIII of 1840 and XX of 1844, which extended to India the English Factors' Acts, were repealed, and this and other sections were

stituted for them. This section, however, renders the law licable to any person who is in 'possession of goods'; and heoruttun was entrusted with these goods, he was in posses- of them. The section goes on to say, 'provided also that h goods or document have not been obtained from their law- owner or from any person in custody of them by means of offence or fraud.' The proviso, I think, applies to cases e the goods have been obtained by means of an offence or l in the first instance, and not to cases where the n who was in possession of them has disposed of them lulently or has committed an offence in so disposing em. If, then, I hold that Sheoruttun was entrusted with the s as a servant, I must also hold that he did not obtain them neans of an offence or fraud; and my judgment, accordingly, t be for the defendants.

Had I found for the plaintiff I should have found that she entitled to Rs. 490 in the first suit, and Rs. 150 in second, that being the value of the property as stated by bundo. On this point there was very slight evidence; but e defendants were not called upon to rebut what was stated enobundo, I must take his evidence to be correct. This indeed, the only matter on which it would have been ne- ry to call the defendants, they having admitted every other er which came within their knowledge, and having produced rticles in Court. Both sides are anxious that the question d be referred to the High Court, and as I also am of on that it is one of considerable importance, I do so ac- ngly.

The question will be:—Whether, having regard to section of the Indian Contract Act, 1872, the plaintiff or the defen- are entitled to judgment."

, for the Plaintiff.

ds in the custody of the servant are not in his possession, the possession of his master. He is a mere custodian and possessed of them. He cannot bring trover, for he has not ession such as to give him a right of possession—he is not see Dicey on Parties, page 358, and note (*e*); Archbold's

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Judgment.

Crim. Plead., page 342; *R.* vs. *Wright*, 1 D. & B.C.C., 431; Smith on Master and Servant, page 284.

The moment the goods were moved by the servant for the purpose of pledging he committed a theft—*Indian Penal Code, section* 378, and illust. (*d*). Then he, for the first time, became possessed of the goods by the commission of an offence, namely, theft. Being possessed by theft conferred on him no title, and he could give no title to another. The case is not one of those in which a person without title can confer title on another, *e.g.*, sale in market overt, coin passed in currency, negotiable instruments passed to *bona fide* holder for value—*Miller* vs. *Race*, 1 Sm. Leading Cases. The Contract Act, section 178, gives no title to pawnbrokers in such cases as this; the case is not within the provisions of that section, which is founded on the Factors' Act, 5 and 6 Vict., c. 39, &c. See *Johnson* vs. *Credit Lyonnais Co.*, 3 C. P. D., 33; *Fluentes* vs. *Montis*, L. R., 3 C. P., 268. Even if the case fell within the provisions of section 268, no title was conferred on the defendant as against the true owners, as the servant who pledged became possessed by the commission of the crime of theft. The plaintiff is, therefore, entitled to recover, and he should have obtained judgment in both cases.

No one appeared for the Defendants.

The judgment of the High Court (1) was delivered by

GARTH, *C.J.*

GARTH, *C.J.*:—

We are of opinion that, under the circumstances stated, the plaintiff is entitled to judgment in both cases. During the plaintiff's absence from home, the jemadar Sheoruttun was left in charge of her house and property *as her servant*. He was never possessed of the articles in question in any other character. He had only the bare custody of them, and had no authority to deal with them in any way whatever. We do not consider that such custody is "possession" within the meaning of section 178 of the Contract Act.

But even if the jemadar could be considered as having taken

(1) GARTH, *C.J.*, and MARKBY, *J.*

articles into his own possession, we think the case is clearly in the scope of the 2nd proviso to that section.

e moment that they were removed by him from the box hich they were placed, for the purpose of being pawned to efendants, there is no doubt that they were fraudulently ob- d from their lawful owner.

the case of *Greenwood* vs. *Holquette*, 12 B. L. R., 42, where e had been hired from the plaintiff, with an option of pur- , and the hirer sold the piano to the defendant before he exercised that option, it was held by Sir RICHARD COUCH, *C.J.*, PHEAR, *J.*, that the defendant was liable in trover to the tiff, although it was found that he acted in perfect good . The Court thought that the possession which was acquir- y the hirer of the piano was not such a possession as was mplated by section 108 of the Contract Act. That case be found a much stronger one than the present, because the hirer of the piano was undoubtedly entitled to the pos- on of it for the time in his own right, whereas here the ession of Sheoruttun was in fact the possession of the tiff.

e plaintiff in the first suit will be entitled to judgment for 430, and in the second suit to Rs. 150, with costs in suits; and she will also be entitled to the costs of this ence.

[CRIMINAL REFERENCE.]

1878 *August 29th.*

No. 28 of 1878.

MOHESH MUNDUL . . . . . COMPLAINANT;

AND

BHOLANATH MUNDUL . . . . . ACCUSED.

Code of Criminal Procedure, section 308—Bail—Convicted person—Prisoner—Fine—Joint fine.

The proper course of procedure under section 308 of the Code of Criminal Procedure is to impose a fine, and out of the fine realized to direct payment to the complainant of such amount as the Court thinks fit, having regard to the provisions of the section.

A Court of Session acting under section 296 of the Code of Criminal Procedure has no power to admit a convicted person to bail.

Kanhai Sahu's case, 23 W. R., Crim., 40, cited and followed.

CRIMINAL REFERENCE from the Judge of Jessore. In this case the Joint Magistrate convicted the accused under sections 143 and 447 of the Penal Code; sentenced him to rigorous imprisonment for one month, and directed that "the accused will also pay" to the complainant two sums of twenty rupees and eleven rupees. It appeared from the Joint Magistrate's order that these sums were not imposed as fines. The Sessions Judge admitted the prisoner to bail, and referred the case to the High Court under section 296 of the Code of Criminal Procedure.

The judgment of the High Court (1) on the reference submitted is as follows:—

The order of the Magistrate, directing the payment of twenty rupees and eleven rupees, is not in accordance with the provisions of section 308 of the Code of Criminal Procedure. The prescribed course is for the Magistrate to impose a fine, and out of the fine realised to direct payment to the complainant of such amount as it thinks fit, having regard to the provisions of the section. As it stands there is no procedure for enforcing it, and it must therefore be quashed. We accordingly set aside.

(1) AINSLIE and MACLEAN, *J.J.*

We cannot interfere with the order of imprisonment. We have to call the attention of the Sessions Judge to the case of *Kanhai Sahu*, 23 W. R., Crim., 40, in which it was held that a Court of Sessions, acting under section 296, has no power to admit a convicted person to bail.

MOHESH MUNDUL *vs.* BHOLANATH BISWAS, AND OTHERS.—*A, B, and C, having been convicted of mischief, the Joint Magistrate sentenced A to one month's imprisonment, and B and C each to pay a fine of ten rupees. He also directed that twelve rupees should be paid to the complainant. Held, that the order for costs was not a fine to be applied under the provisions of section* 308; *that what portion of the twelve rupees was payable by each of the accused being undetermined, it could not be said that A was sentenced to fine and imprisonment, and therefore no appeal lay; and that, as the case was one in which the police could not arrest without warrant, the Magistrate had power to award costs under section* 31 *of the Court Fees' Act, VII of* 1870, *but that these costs must be limited to costs out of pocket.*

This was a Criminal Reference from the same Judge. The Deputy Magistrate convicted the accused of mischief and sentenced Bholanath Biswas to one month's rigorous imprisonment, and the other two to pay a fine of ten rupees each, or in default, to be rigorously imprisoned for one month. He also directed the three prisoners to pay twelve rupees cost to the complainant. The Magistrate referred the case to the High Court to have the latter part of the order quashed.

AINSLIE, *J.* (MACLEAN, *J.*, concurring):—In this case the order for costs is clearly not a fine to be applied under the provisions of section 308. There is no provision in the Code for the imposition of a joint and several fine. As the amount payable by each accused is undetermined, it is impossible to say that any fine was imposed upon Bholanath in addition to the imprisonment awarded. He, therefore, had no right of appeal, and must undergo the sentence passed upon him. In this case the offence under section 426 being one in respect of which the Police cannot arrest without warrant, the Magistrate was authorised, under section 31 of Act VII of 1870, to award certain specified costs; but if the Magistrate had been acting under that section, he should have caused a statement of costs to be appended to his order, and could not exceed the actual costs of the complainant out of pocket. In this case also the Judge has erred in admitting the convicted prisoners to bail. The order awarding twelve rupees costs is quashed.

[CRIMINAL REFERENCE.]

1878
August 20th.

No. 367
of 1878.

IN THE MATTER OF PARBUTTI CHURN BOSE, AND ANOTHER.

Recognizance, Forfeiture of—Security to keep the peace—Forfeiture of Recognizance—Penalty—Act X of 1872, section 502.

On the 20th of April 1877, A was bound down to keep the peace for one year. On the 14th of January 1878, he was convicted of an offence and sentenced therefor to fine and imprisonment, but no order was made for the recovery of the penalty, though the Magistrate knew that the recognizance had been forfeited. On the 2nd of April 1878, the Magistrate, at the instance of a third party, called upon A to show cause why the penalty of the recognizance should not be paid, and a warrant for its recovery was issued on the 6th of June 1878 *Held*, that the warrant must be quashed, on the ground that the Magistrate having inflicted a sentence of fine and imprisonment with the knowledge that the recognizance was forfeited, he was not competent to inflict a further penalty on a re-consideration of the circumstances.

CRIMINAL REFERENCE from the Judge of Jessore. The terms of the reference are as follows:—

It appears that the petitioners Parbutti Churn Bose and Huri Churn Bose were, on the 20th of April 1877, bound down to keep the peace for one year, personally in the sum of Rs. 200, and security being also given for Rs. 200.

"On the 14th January 1878, these two persons were convicted by the Deputy Magistrate, under section 379 of the Indian Penal Code, and sentenced each to three weeks' rigorous imprisonment, and a fine of Rs. 20, the theft, it appears, relating to cutting of paddy by order of defendants. It may be observed that in his judgment the Deputy Magistrate notices the fact that they had been bound over to keep the peace, but takes no steps to enforce the penalty, nor does the Magistrate, who dismissed the appeal on the 6th of February. It was not until after petition, dated the 10th Bysak 1285, (corresponding to 2nd Apr 1878), had been presented, that steps were taken to enforce penalty, and an order directing the forfeiture of recognizance was passed by Mr. Taylor, the present Officiating Joint Magistrate on the 17th June 1878.

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In re PARBUTTI CHURN BOSE.

Reference.

"With reference to the judgment of the High Court, dated August 30th, 1877, in re *Ram Chunder Lalla, petitioner*, which has been brought to my notice by the pleader for petitioners, I beg to recommend that the Officiating Joint Magistrate's order be set aside. It was passed after the term had expired, although the offence for which they were convicted by the Deputy Magistrate was, as appears from the Officiating Magistrate's judgment, committed before, viz., on the 12th or 13th Aughran 1284, corresponding with the 26th or 27th November 1877. I have before observed that neither the Deputy Magistrate nor the District Magistrate had taken action to enforce the penalty."

The following judgments were delivered by the High Court (1) on the reference submitted :—

AINSLIE, *J.* :— AINSLIE, *J.*

In this case, as in the case referred to by the Judge, the forfeiture of recognizance to keep the peace has been added to the punishment awarded for a specific offence at the instigation of a person other than the person injured by the offence which constituted the breach of the conditions of the bond, and after the term covered by the bond had expired. The fact that Parbutti Churn Bose and Huri Churn Bose were under recognizances was perfectly well known to the convicting Magistrate, who repeatedly refers to it in his judgment, and it could not have escaped the notice of the District Magistrate to whom there was an appeal from the conviction; it is therefore unnecessary to presume knowledge. Neither of these officers considered it necessary to enforce a forfeiture of the recognizances, and the offence with which the accused were charged was dealt with by inflicting what was considered adequate punishment, consisting of rigorous imprisonment and fine.

After this case had been thus dealt with, a petition was presented to the Magistrate by one of the persons interested in the original matter which had led to the recognizances being taken, but not to the later complaint, asking him to proceed on the recognizances. Acting on this petition the Magistrate has declared them for-

(1) AINSLIE and MACLEAN, *J.J.*

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In re PARBUTTI CHURN BOSE.

Judgment.

AINSLIE, J.

feited; and it happens that this petition was presented, and this action taken after the term of the recognizances had expired, though this is not material.

It thus appears that the Magistrate has by a second order added to the penalty imposed for the act done by the accused. It must be assumed that, when the Magistrate determined the measure of punishment to be inflicted, he took into consideration all the circumstances of the case, and that he deliberately fixed on a certain measure of punishment as adequate. It is impossible to say that if he had at the time proceeded on the recognizances, and thereunder imposed a fine of two hundred rupees on the accused, he would have passed the other sentence which in fact he did pass. He might have passed that or any more severe sentence warranted by law, and at the same time might have forfeited the recognizance if he had thought it necessary to do so; but then it would have been evident that he considered the entire cumulative penalty appropriate.

As matters stand, we have a punishment measured out which must be taken to be the full punishment which the convicting Court considered appropriate at the time, and then we have superadded on a review of the circumstances at another time an additional penalty, the effect of which must be to make the original penalty, when viewed as only a part of the punishment inflicted, an excessive one.

Although the words of sections 460 and 464 may not exactly cover the case, it seems to me to come distinctly within the spirit of those sections. When an accused person is brought before a Court charged with the commission of a certain act which makes him liable to be dealt with as an offender, the Court in dealing with him is bound to take into consideration all the circumstances before it which may affect the measure of punishment awarded and must be taken to have considered them, whether it has in fact done so or not.

The course adopted by the Magistrate, therefore, involves a further punishment for the same act after a decision by a competent officer (in this case the District Magistrate himself) that the act might be adequately atoned for by a certain fixed measure of punishment.

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In re PARBUTTI CHURN BOSE.

Judgment.

MACLEAN, *J.*

I would, therefore, quash the Magistrate's proceedings for the forfeiture of the recognizances, and direct that any money recovered thereunder be refunded.

MACLEAN, *J.* :—

I think that in this case the District Magistrate was bound under section 502 of the Criminal Procedure Code to call upon Parbutti Churn Bose and Huri Churn Bose to show cause why the penalty of their recognizance bond should not be paid as soon as the forfeiture was proved before him, and he would then have had to consider what punishment was suitable for the offence entailing the forfeiture in addition to the penalty due under the recognizance bond.

The Deputy Magistrate having referred to the recognizance bond in his judgment, the District Magistrate was aware that it had been forfeited, and it is not more than fair to Parbutti and Huri to suppose that the Magistrates thought that a sentence of imprisonment and fine was the appropriate and full penalty for their offence. At least if they did not think so, they should have stated in their judgments that in addition to the punishment then dealt out, proceedings would be taken to recover the penalty of the recognizance bond.

It cannot be the intention of the Legislature that, when a forfeiture of a bond has been proved before a Magistrate, the recovery of the penalty is to be kept suspended over the head of the person liable, for an indefinite period. I concur in quashing the order in this case for the realization of the penalty.

[CRIMINAL APPELLATE JURISDICTION.]

1878 *August 16th.*

No. 44 of 1878

BISSURAM KOIREE . . . . . APPELLANT;

AND

THE EMPRESS . . . . . RESPONDENT.

Adultery—Sagai Wives—Marriage of Widows—Behar, Customs of castes in

Sagai wives, *i.e.*, widows married in accordance with the custom o *Sagai* prevailing amongst the Koiries and other low castes of Behar are so far the legal wives of their husbands as to justify the punish ment of persons committing adultery with them.

CRIMINAL APPEAL from a judgment and sentence passed by the Sessions Judge of Patna. The judgment is as follows:—

In this case the prisoner is charged with having committed adultery with one Parbuttia, the wife of one Janki, prosecutor.

The points for decision are:

First—Was the alleged act of adultery committed? *Second*—Was Parbuttia the *Sagai* wife of Janki? *Third*—Was she known to prisoner to be the *Sagai* wife of Janki? *Fourth*—Are *Sagai* wives, *i.e.*, females married in accordance with the custom of *Sagai* prevailing amongst the Koirees and other low castes of Behar, the legal wives of their husbands, so as to justify the punishment of persons committing adultery with them?

[The learned Judge here recapitulated the evidence on the first three points which were found in the affirmative, and then proceeded.]

As to the fourth point it has been very warmly urged by the counsel for the prisoner that the *Sagai* marriages are no marriage at all, and that therefore, even if the prisoner did have sexual intercourse with Parbuttia, he cannot be held guilty of adultery.

It has been contended that from the evidence it would appear that Brahmins do not officiate at the *Sagai* marriage, the marriage ceremony being the putting of a red or *Sindur* mark on the bride's forehead in the presence of assembled friends and relatives

Even supposing that widows can be allowed to marry a second time, they should, when doing so, go through the forms prescribed in the Shastras, otherwise they are not married.

This Court is clear that the usual forms prescribed for Hindu marriages *primâ facie* cannot possibly, or at any rate need not be necessarily gone through in the case of widow marriages practised by the lower orders or castes. If it had been shown that as a rule and by custom those forms are always observed, but were not observed in this instance, it might undoubtedly have been urged that Parbuttia was not married. No such argument has been raised, and there is no ground for believing that Parbuttia's marriage was performed otherwise than according to custom, as deposed to by Sebak Mahtoo.

It has also been contended that *Sagai* is a name which is indiscriminately applied to two different things, namely, the marriage of a widow, and also by a sort of euphemism to a bigamist marriage, that is, the marriage of a woman whose husband is alive to another husband of the same caste.

With reference to the above contention evidence has undoubtedly been given which establishes the fact that in some instances a woman who marries another husband while her first husband is alive, induces a *punchait* to restore her to caste by the payment of a fine. It is, however, quite clear that, although such marriages are then, after recognition by the *punchait* and not otherwise, called *Sagai* marriages, they are deemed improper marriages, and are not in any sense real *Sagai* marriages or marriages contracted by widows. Such marriages are on the contrary valid without the permission of any *punchait*, and are admitted even by the witnesses for the defence, several of whom have *Sagai* wives, to be just as good as *Biyahee*, or first marriages. It has in no way been shown that Parbuttia married when her first husband was alive; on the contrary there is evidence—and that evidence is unrebutted—to show that her former husband Budhoo was dead when she married Janki according to the *Sagai* form of marriage. It would be ridiculous to hold that her *Sagai* marriage was invalid, simply because the same name is loosely used with reference to connections which have, so to speak, been irregularly sanctioned by *punchaits* after levying a fine. The

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BISSURAM KOIREE v. THE EMPRESS.

Judgment.

Court is far from holding that such connections are legally valid, but that is not the point now before it.

Two precedents have been quoted from the Bombay High Court Reports., Vol. II., pp. 175, 125, in which it has been held that marriages entered into during the lifetime of the first husband cannot be legalized even by custom. As already stated, such a doctrine may or may not be correct, but it does not affect the question now before the Court. Parbuttia's marriage as a widow to Janki is not, as the law now stands, *per se* illegal, and it has been amply proved by the evidence adduced by both sides that in numerous low castes in Behar, *i.e.*, Koirees, Dosad, Gowalahs, Telees and others, widow marriages solemnized by the mere affixing of a red or *Sindur* mark in the presence of friends and relatives have long been and are still prevalent, and considered in every way as valid as *Biyahee* or first marriages.

Looking to the whole evidence before it, and after full consideration of the arguments raised by the prisoner's counsel, this Court has no hesitation in holding that *Sagai* marriages, *i.e.*, the widow marriages entered into in this province by Koirees and other lower castes, are in every sense of the word legal and valid. The prisoner is not, therefore, entitled to an acquittal, simply because Parbuttia was not Janki's *Biyahee*, but his *Sagai* wife. The prisoner is sentenced to two years' rigorous imprisonment.

Moonshee *Mahomed Yusoof*, for Appellant.

The judgment of the High Court (1) was delivered by

AINSLIE J.

AINSLIE, *J.*:—

The Court below has, upon the evidence in this case, held that there is a custom of re-marriage in the class to which the complainant and accused belong, which is known as *Sagai*; that the position of a wife who is married in this form, except in respect of participation in oblations to the gods, differs in no respect from the position of a wife married in the ordinary *Biyahee* form; and that in respect of the legitimacy of the children of such marriages both forms stand on the same footing. It is also

(1) AINSLIE and MACLEAN, *J.J.*

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BISSURAM KOIREE v. THE EMPRESS.

Judgment.

AINSLIE, J.

own by the evidence that, although undoubtedly this form of rriage sits very loosely on persons of this caste in that part of country, still adultery is recognized as an offence of which caste takes notice, and that continued cohabitation of the ulterer and the woman are not recognized as legal until a fine osed by the *punchait* to whom the matter is submitted for ision is paid.

The payment of that fine appears to have the effect of a dis- ution of the first marriage and legalization of subsequent abitation. Whether strictly speaking it would have that effect, is not necessary for us to decide. According to the cases re- ed to by the Sessions Judge in the Bombay Reports, it is doubt- whether it would. However, that does not affect the present stion. Even supposing that the decision of the *punchait* could ng about a valid divorce and legalize subsequent cohabitation, t does not touch the question whether previous to their decision first marriage was in existence or had been dissolved. As nderstand the contention of the learned pleader for the ac- ed it is this, that the connection with a man other than the band by itself dissolves a marriage of this class, and therefore within the option of the woman to terminate it at any mo- it she pleases. Such a doctrine is novel and requires evidence ustom to support it, which certainly is not to be found in this . In the absence of very positive evidence, it cannot be ex- ted that this Court will do any thing to relax the already very e bond of marriage which is recognized by certain castes in ar.

We think that the conclusion arrived at by the Judge and As- ors is a correct one, and that the conviction is proper, but sidering the nature of the form of marriage and the ease with ch it may be dissolved, we think that the penalty of two years' rous imprisonment is more than necessary under the circum- ces. We, therefore, reduce it to six months.

[CIVIL REFERENCE.]

1878 *August 14th.*

No. 13 of 1878.

GUNI KHAN AND ANOTHER . . . . . PLAINTIFFS;

AND

KOONJO BEHARY SEIN . . . . . DEFENDANT.

Damages—Settlement out of Court—Execution of Decree—Act X of 1877, section 258.

A decree-holder, who, although he has settled with his judgment-debtor out of Court, yet nevertheless sues out execution against him, will be liable to an action for damages at the hands of the judgment-debtor. Sections 244 or 258 of Act X of 1877 have made no change in the law in this respect.

REFERENCE under section 617 of Act X of 1877 for the opinion of the High Court, from the Judge of the Court of Small Causes at Kooshtea. The case is stated as follows :—

"In 1876 the present defendant obtained a money-decree for Rs. 70 against the plaintiffs. It provided payment by instalments, and defendant admits that some of the prior instalments had been paid out of Court. There was a balance of Rs. 48-14, in respect of which defendant sued out execution, and plaintiffs had to deposit this amount, together with costs, in all Rs. 55-6 in Court. Plaintiffs allege, that on the 14th February last, they paid to the defendant Rs. 48-14 out of Court, and obtained from him a receipt of the nature of a discharge from further liability under the aforesaid decree. The present action has been brought for the recovery of damages for injury sustained by the plaintiffs on the ground of defendant having executed a decree that was already satisfied, and the damages have been estimated at Rs. 55-6, being the sum paid. It is stated in the plaint that the plaintiffs put in an objection under section 258 of Act X of 1877, to the execution proceedings, but it was disallowed in consequence of its not being preferred within 15 days. The defendant contends that under section 244 and 258 of the new Code, this action does not lie, and that no adjustment of the decree, such as is stated in the plaint, did take place out of Court.

ts on which the parties are at issue are: (1.) Whether action can be maintained? (2.) Whether there was of the decree in question out of Court?

l to the second point, I have found as a fact that the ustment of the decree did actually take place, and the by a receipt in writing, absolved the plaintiffs from under it. It does not appear to me that there was s contract between the parties that the adjustment ertified to the Court. Only the receipt marked exhibit the very face of it out-and-out discharge of the debt; posing the present action can be maintained, it is quite aintiffs are entitled to a verdict in their favor as they y got.

e question is, whether the action can at all be main- it is upon this that the opinion of the Honorable solicited. I am inclined to think with the plaintiffs' the case has been well instituted, and that neither 4 nor section 258 of the new Code is a legal bar in Section 244 is a re-enactment of section 11 of [of 1861, and there is nothing in the present which the old Act.

it was the policy of the old law to allow an action like the present to proceed, as the cases in the margin (1) abundantly show, I fail to understand why that of a re-enacted law should

L. R., 223, n S. C. C.

argued on behalf of the defence that section 258 has d a policy quite different. No doubt under that s competent to the Court to determine whether there nent of a particular decree, and whether the decree- ld be directed to certify it, and whether the decree- ld be allowed to sue out execution. But this proce- understand it, is simply permissive which the Court ay not follow; and if it is merely permissive, it cer- ot deprive the aggrieved judgment-debtor of his regu- at law or in equity.

ind, the action gives relief to the judgment-debtor when after obtaining a private adjustment of the

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Judgment.

judgment-debt he finds its incidence to fall heavy upon him, because he was not prudent enough to have it certified. As it is, it is summary, prompt, and immediate relief; but it cannot be the only one contemplated by the Legislature.

In the present case, though an express agreement on the part of the defendant to certify adjustment is not shown, still the moment he received the decretal amount and consented to the discharge of his judgment-debtors, he entered into a tacit contract to abstain from suing out execution if not to certify adjustment, so that when he did sue out execution, he committed a breach of that contract—a breach causing injury to his judgment-debtors, and such an injury as he was bound in law to compensate.

If it be contended that there was no contract, either express or implied, simultaneous with the adjustment, then defendant's conduct has been grossly fraudulent; and this act of fraud has caused damage to the plaintiffs. Fraud, as the maxim goes, is always a new cause of action, and plaintiffs are quite competent to sue upon it with a view to obtain that redress which no execution Court can give. For these reasons I think that the suit has been well instituted. But as the question is not free from doubt, I have passed a decree in plaintiffs' favor, contingent upon the opinion of the Honorable Court.

The High Court (1) delivered the following judgment on the Reference submitted :—

We think that a suit will lie, and that the law is unaltered in this respect.

(1) MARKBY and PRINSEP, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

MAHARAJAH BIR CHUNDER MANICKYA BAHADUR . . . . . } DEFENDANT;

1878 *June 19th.*

No. 22 of 1877.

AND

ISHAN CHUNDER THAKUR . . . . . PLAINTIFF.

Jurisdiction—Rajah of Tipperah—Maintenance Grant—Life Interest—Hereditary Grant—Construction of Deed of Gift.

Save in respect of his zemindary in British Territory, the Rajah of Tipperah is not subject to the jurisdiction of the Courts in British India, except in cases mentioned in clauses (*a*), (*b*), (*c*), section 433, Act X of 1877. *Nilkristo Deb Barmano* vs. *Bir Chundra Thakur*, 3 B. L. R., P. C., 13; and *Rajkumar Nobodip Chundro Deb Burmun* vs. *Rajah Bir Chandra*, 25 W. R., 407, cited.

A maintenance grant claimed to be hereditary—*held* to be for life only—*Lekhraj Roy* vs. *Kunhya Singh*, I. L. R., 3 Cal., 212, quoted.

A maintenance grant which the donor directs to be paid by his agent out of the revenues of a certain zemindary, does not form a charge on that zemindary.

REGULAR APPEAL from a decree passed by the Subordinate Judge of Tipperah.

Paul, (Advocate-General), and *Piffard*, for the Appellant.

Baboo *Kally Mohun Dass* and Baboo *Doorga Mohun Dass* with them.

Baboo *Mohiny Mohun Roy*, and Baboo *Nullit Chunder Sen*, for the Respondent.

The facts of the case are sufficiently set forth in the judgment of the High Court (1), which was delivered by

MACLEAN, *J.*:— MACLEAN, *J.*

This is a suit for maintenance. The plaintiff is a great-grandson of a former Maharajah of Tipperah, who was both an independent ruler and a zemindar of lands in British territories. The defendant is the present Maharajah and is incorrectly described as resident of his Cacheri in British Tipperah.

(1) MITTER and MACLEAN, *J.J.*

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MAHARAJAH BIR CHUNDER MANICKYA BAHADUR v. ISHAN CHUNDER THAKUR.

Judgment.

MACLEAN, J.

The allegation of the plaintiff is, that the Maharajah of the day bestowed an allowance of Rs. 1,200 annually on his father in 1238, Tipperah, which was subsequently increased to Rs. 6,000; that after the death of his father the then Maharajah in 1261 T. (1264 B.) continued a portion of the allowance to the plaintiff, his mother and his brother, fixing Rs. 150 a month as payable to them. Plaintiff's brother and mother are dead, and his claim is for arrears of their shares of the allowance which were, he says, enjoyed by his mother up to her death two years and a half before the institution of this suit.

The defence put in on behalf of the Maharajah was to the effect that the share of the allowance enjoyed by the plaintiff's brother lapsed on his death more than twelve years ago and was not enjoyed by plaintiff's mother. It was then contended that the allowance was not hereditary.

The Subordinate Judge gave the plaintiff a decree, finding that the allowance was hereditary, and that plaintiff's mother enjoyed her deceased son's share up to her death, which occurred less than 12 years before this suit was instituted.

In appeal before us the Advocate-General, who appeared for the Maharajah, defendant, contended: *First.*—That the terms upon which the allowance was continued or made in 1261 T. did not convey an hereditary estate, but an estate in severalty to enure for the lifetime of each of the grantees. *Secondly.*—That if there was an hereditary estate, then the claim to Bhagvan's (plaintiff's brother's) share was barred, as he died 22 years ago. *Thirdly.*—That the grant of the allowance was a Sovereign act. *Fourthly.*—That the British Courts had no jurisdiction to entertain the suit at all. The last of those grounds was not taken in the Court below, and as the Advocate-General stated that he did not press it unless this Court should be against him on the merits of the case, we will take the grounds in the order in which they are put before us.

As regards the nature of the allowance, we think the Subordinate Judge was wrong in finding that it was hereditary. It appears that in 1238 T. Rajah Kashi Chundra issued a letter to plaintiff's father, informing him that he would receive Rs. 1,200 annually out of the collections of the zemindari

British Tipperah, and also that the allowance would be paid to his sons and grandsons. In the following year the allowance was increased to Rs. 6,000, in nearly the same terms. In 1261 T. Rajah Ishan Chundra Manikya issued a letter, in which it was stated that the allowance had been reduced to Rs. 150 monthly for the maintenance of plaintiff, his mother and his brother by a letter, dated 21st Bhadro 1240 T. This letter is not in the record, but in Rajah Ishan Chundra's letter of 1261 T. it is stated that that allowance is to be paid to plaintiff, his mother and his brother in equal shares, and the plaintiff's case is, that this letter constitutes a grant for ever to the three persons mentioned in it, and on their death to the survivor and to their heirs. We are of opinion that there is nothing in the letter of 1261 T. which creates any hereditary interest. There are no words referring to the descendants as heirs of the persons named in it, and we think that following the rule laid down in I. L. R., 3 Cal., 212, "that if a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime only, unless there are some words showing an intention to grant an hereditary interest," we should hold that the allowance was one for the life only of the grantee. The plaintiff's (special respondent's) pleader contended that the earlier letters of 1238 and 1239 contained words indicating the hereditary nature of the allowance, and as the letter of 1261 states that those letters are "approved," and also recites that the money is to be paid "for ever according to family custom," the plaintiff is entitled to claim the whole allowance as heir of the other two grantees. But the fact is, that the allowance has never been considered as permanent as the letters themselves show. The fact that after the death of Shumbu Chundra it was reduced from Rs. 6,000 to 1,800 annually is conclusive of the instability of the grant. Then, as to the words "for ever" which occur in the grant, we think that they are qualified by the context. The letter runs thus: "The Mukhtar should make over the said monthly allowance, month by month, annually in equal shares to yourself, your mother and brother, for ever according to the custom of the family," from which it is clear that the payment is to be made for ever to each of the grantees according

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Judgment.

MACLEAN, *J.*

to the family custom; and as to this family custom, we find that the Court has already ruled, that grants for maintenance in the Tipperah Rajah's family are by recognised custom voidable by the successor of the grantor—*vide* decision in Regular Appeal 153 of 1867.

It, therefore, becomes unnecessary to consider the oral evidence in this case, and we decide that the allowance being terminable at the will of the Rajah is not hereditary or permanent in its nature. This decision renders it unnecessary to say whether plaintiff is entitled to sue for the share of his brother Bhagvan from the date of his mother's death.

The Advocate-General next argued that this allowance was a Sovereign grant, and the language of the letters upon which plaintiff relies supports this view. It does not purport to create an obligatory contract upon the Maharajah to pay the allowance, but simply informs the addressees that the Maharajah has been pleased to fix a particular amount as their allowance for maintenance. No action would lie upon the strength of these letters even if the Maharajah were subject to the jurisdiction of British Courts, and this brings us to the last point, viz., whether the Maharajah is subject to that jurisdiction.

"The Rajah of Tipperah, though in respect to (some of his) lands subject to the Laws and Courts of British India, is in fact an independent prince with a considerable territory known as the Tipperah Hills." This is the definition of his position which the Judicial Committee of the Privy Council have adopted,—3 B. L. R., 13. P. C.; and, although some doubts as to the extent of his Sovereign Powers have been thrown out by MACPHERSON, *J.*, in 25 W. R., 407, we think that in point of fact he is not subject to our Courts, except in cases mentioned in section 433, Act X of 1877, clauses (a,) (b,) and (c,) save in respect to his Zemindary in British Territory. An attempt was made by respondent's pleader to persuade us that the allowance claimed in this case is a charge upon that Zemindary, but this is not the fact. It is true that the Rajah's orders were that it should be paid by his Agent from the revenues of the Zemindary; but it is in no sense a charge upon the Zemindary, and such an order does not give the Courts jurisdiction if they do not possess it otherwise.

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One other point was alluded to by appellant's Counsel in the ourse of argument, and that is, that there is no cause of action ithin the jurisdiction of the Court, as the residence of the ppellant, and the place at which the transaction (*i.e.*, the issuing f the letter of 1261 T.) took place were in Independent Tipperah. he question was not raised in the lower Court, nor is it clearly aised in the petition of appeal, and we do not think it necessary o discuss it. The result is, that we decree this appeal, and dis- iss the plaintiff's suit with costs in both Courts.

[CIVIL APPELLATE JURISDICTION.]

DHORONI DHUR SEN, AND ANOTHER . . . DEFENDANTS;

AND

HE AGRA BANK . . . . . PLAINTIFF.

Sept. 16th.

No. 1 of 1878.

Injunction—Court of Co-ordinate Jurisdiction—Invalid Decree—Jurisdiction—Dena-pawna—Assignee of Judgment-debtor—Substitution.

No Judge has power to issue an injunction against a decree-holder to restrain him from executing the decree of another Judge exercising co-ordinate jurisdiction, upon the ground that the proceedings by which the decree was obtained were altogether illegal.

A, the owner of an Indigo concern, sold the property to B, the deed of sale containing a *dena-pawna* clause. A party who held an unsatisfied decree against A, applied to the Court to substitute B's name for A's in the record, with a view of taking out execution against B. The application was granted. *Held*, (affirming the decision of WHITE, *J.*,) that the Court had no jurisdiction to make such an order.

PPEAL under section 15 of the Letters Patent from a de- on of WHITE, *J.* The facts of the case will be found reported C. L. R., 283.

aboo *Rash Behary Ghose*, for Appellant.

he grounds on which the application of 1875 were rejected y. with equal force to the present suit. If they cannot ask ave the proceedings set aside, they cannot get an injunction ey cannot obtain indirectly what they cannot obtain directly. facts set out in the plaint make no case for an injunction— ific Relief Act I of 1877, section 54, cl. (e), Illust. (p), (q);

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Argument.

and section 56. The Subordinate Judge had authority to p the Agra Bank on the record—*Doorga Soonduree Debea* vs. *Soo Monee Debea*, 8 W. R., 101.

[MARKBY, *J.*—That case decides nothing in point here. . parties consented.]

Baboo *Rash Behary Ghose.*—In *Lalla Poorihit Lall* vs. *Mus mut Sabeerun*, 7 W. R., 368, the assignee of the judgme debtor was put on.

[MARKBY, *J.*—In that case the judgment-debtor did not ask be taken off. It was the purchaser who did not want him on.]

[AINSLIE, *J.*—Is that case any authority for showing that t decree-holder may put on the record a debtor of his judgme debtor's against the will of the former? I never heard of su an application. It is adding a party to a suit after decree.]

Baboo *Rash Behary Ghose.*—The proceedings may have be irregular, but still the Court had jurisdiction—*Pogose* vs. *Beeb Dishkoon Waris Calchuck*, 2 C. L. R., 278.

If an injunction be granted, it should only be granted on co dition of plaintiffs paying the debt. They are in fact the debto having taken over the *dena-powna* of the concern.

Evans, for the Respondent.

In the application made in 1875 (in re *Cochrane's petitio* 14 B. L. R., 330), it was held that the Agra Bank should not ha been made a party; it is admitted here that the execution pr ceedings could not pass a good title; so that the result of pr ceeding with the execution would be expense to the Bank wi out gain to any party. This being the case, the Court will gra an injunction, in the same principle as it would grant one prevent the bringing of useless and vexatious ejectment sui In the *Tagore petition*, 14 B. L. R., 334, note, the proceedi were set aside after sale. Here we come in before the sale and that the useless proceedings be stopped. We are entitled to declaration that the proceedings are null and void.

There is no doubt a suit will lie to set aside an order under Act VIII of 1859, section 208—*Abedonissa Khatoon* *Ameroonissa Khatoon*, L. R., 4 Ind. App., 66; but it is said

re barred by limitation. The learned Judges, however, do not ay, and the learned pleader on the opposite side cannot tell, that clause of the Limitation Act applies. I suppose we shall never know what is the mysterious provision that prevents our setting aside the order.

The power to grant an injunction has been admitted by both the learned Judges in the Court below. Mr. Justice MITTER only dissents on the ground that there are equitable considerations in the way of granting an injunction, namely, that on the authority of *Kearnes* vs. *Bhowani Churn Mitter*, B. L. R., Sup. Vol., 54, the Bank is liable for the debt. We dispute that the debts we undertook to pay under the *dena-powna* clause were the ordinary debts of the concern which this is not. The question of our liability cannot be determined in a collateral way in this suit.

As far as acquiescence is concerned, the mere fact of not appearing to object to our being placed on the record is of no weight. —*Ramsden* vs. *Dyson*, L. R., 1 H. L., 129.

Baboo *Rash Behary Ghose* in reply cited Story's Eq. Jur., secs. 874, 890, and Kerr on Injunctions, p. 18.

The following judgments were delivered by the High Court (1):—

MARKBY, *J.*:— MARKBY, *J.*

The facts of this case are fully set out in the judgment of Mr. Justice MITTER delivered in the Court below. They are shortly as follow :—One Brojonauth having obtained a decree for damages against the executors of the surviving partner in an Indigo concern, sold it to one Gridhur, from whom it passed to the defendant. The executor then sold the Indigo concern with *dena* and *powna* to the Agra Bank. In 1871, the then decree-holder applied to the Court in which the decree was passed to substitute the Agra Bank in the place of the original judgment-debtors. A notice was issued and duly served upon the Manager of the Bank, who did not think fit to appear upon the notice, and the application was granted.

In December 1874, an application was made by the defendants to execute the decree against the Bank. The Bank then appeared

(1) JACKSON (Offg.) *C.J.*, MARKBY and AINSLIE, *J.J.*

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DHORONI DHUR SEN v. THE AGRA BANK.

Judgment.

MARKBY, J.

to oppose the application, but execution was ordered to proceed. The Manager then applied to this Court under 24 and 25 Vic., c. 104, sec. 15, to set aside the order by which the Bank was substituted as judgment-debtors. That application was refused. The Bank then brought this suit, wherein they pray to have it declared that the order of the substitution was illegal, and that the same, with all proceedings taken thereunder, be set aside, and also that an injunction be issued restraining the defendant from taking any further proceedings against the plaintiffs under the decree.

The suit was instituted in the Court of the Subordinate Judge of Jessore, the same Court as that in which the original decree was passed, and in which the order of substitution was made. The Subordinate Judge dismissed the suit.

On appeal to this Court, the learned Judges differed in opinion. Mr. Justice WHITE thought that the suit, so far as it sought to set aside the order of substitution, was barred by limitation; but that an injunction against further proceeding to execute the decree ought to be granted. Mr. Justice MITTER agreed as to the first point, but thought that the plaintiffs were not entitled to an injunction. A decree for an injunction having been drawn up in accordance with the opinion of the senior Judge, the defendants have now appealed from that decree.

I entirely agree with the view expressed by Mr. Justice WHITE in the Court below, that the Subordinate Judge had no power whatever to make the order of substitution against the Bank. I know of no statutory provision or principle of law upon which such an order could be made; but I do not think it follows from this that the injunction prayed for ought to be granted, and upon consideration I think that it ought not to be granted.

There are several methods by which an erroneous order, which has been improvidently issued, may be set aside or its effect nullified. Thus, if an appeal lies, the order may be appealed against, or the order may be reviewed by the Court which made it. In some cases a suit to reverse the order, treating it as a summary order, may be brought. Moreover, if the order be one which has been made without jurisdiction, it may be set aside by this Court under its power of superintendence. So, too, if any person

ınder color of an order made without jurisdiction to do
hich would be otherwise unlawful, the order would not
him any protection.

for one Judge to issue an injunction against a decree-
to restrain him from executing the decree of another
exercising co-ordinate jurisdiction upon the ground that
ceedings, by which the decree was obtained, were altoge-
egal, is, as far as I am aware, a proceeding entirely with-
ecedent, and one which it seems to me very dangerous to
ıce. It has already been found difficult enough to bring
on in this country to a termination; and, if we were to
this injunction, I am very much afraid that advantage
be taken of the precedent to prolong litigation very much
:.

cases in which injunctions are granted by the Court of
ry against proceedings in other Courts in England, appear
to rest upon a totally different principle. They proceed
the assumption that the rights of the parties cannot be
nquired into except in the Court of Chancery itself. But
gnificant that, as soon as all the Courts of Westminster
ame to be Courts of co-ordinate jurisdiction under the
ıdicature Acts, this proceeding by way of injunction was
ıed.

Specific Relief Act (Act I of 1877) is not applicable to
e, but it may be observed that under that Act it is express-
ared that no injunction to stay proceedings can be granted
the Court in which the proceedings are to be stayed is
inate to that in which the injunction is sought.

ourse, what I have now said has no application
s in which the order itself, being admitted to be
ıd binding, the plaintiff alleges that circumstances have
d since the order was made which render it inequitable
s order should be enforced. I am now dealing with cases
h the suit is brought to prevent a decree being enforced
he ground that the order by which the defendants were
dgment-debtors was itself *ab initio* illegal.

he case of *Moran* vs. *The River Steam Navigation Co.*,
L. R., 82, on the Original Side, I issued an *ad interim*

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Judgment.

MARKBY, J.

injunction directing certain parties not to proceed with a suit in the District Court of Hooghly. The Court of Appeal thought this event too far, but ordered that the decree of that Court when obtained should not be executed. But that case proceeds upon the assumption that the District Court of Hooghly is subordinate to this Court, and that this Court had power to remove the suit from that Court and to try it here. A suit relating to the same matter had been brought here before the suit had been brought in the Hooghly Court, and unless injunction had been granted, there might have been a conflict of jurisdiction between the two Courts. That case appears to me, therefore, to be quite distinguishable.

The conclusion I have come to is, that the injunction prayed for is not one which the Subordinate Judge was empowered to grant, and the suit was, therefore, rightly dismissed.

JACKSON, (*Offg.*) C.J.

JACKSON, (*Offg.*) C.J. :—

I concur. Appellant must have his costs.

[CIVIL APPELLATE JURISDICTION.]

LUCHMESSUR SINGH . . . . . DEFENDANT;

AND

LILANUND SINGH . . . . . PLAINTIFF.

1878 *July 22nd.*

No. 308 of 1876

Ferry—Infringement of Right of Ferry—Cause of Action—Injunction.

Where a right of ferry is settled with a zemindar, the infringement of that right by reason of the establishment of another ferry by a neighbouring proprietor at a short distance will give a cause of action; and the owner of the new ferry will be restrained from carrying over in his boats, whether for hire or otherwise, persons other than his own servants, or persons lawfully engaged upon his business or going to his premises.

REGULAR APPEAL from a decree passed by the Subordinate Judge of Purneah.

Baboo *Unnoda Prosad Banerjee*, for the Appellant.

Paul, (Advocate-General,) for the Respondent. Mr. *R. E. Twidale*, and Moonshee *Mahomed Yusoof*, with him.

The facts of the case are sufficiently set forth in the judgment of the Court (1), which was delivered by

JACKSON, *J.*:— JACKSON, *J.*

This suit was brought by Rajah Lilanund Singh, Zemindar, against the Rajah of Dhurbanga, under the Court of Wards, for removal of the ferry boats established under the defendant, at the ghât denominated Chunapore, in the current stream of the river Kosi, appertaining to Mouzah Madhoobani, and for an injunction forbidding the taking of the ryots of the defendant's zemindari and of travellers across the river on adjudication of the plaintiff's right." It appears that the defendant is the owner of an estate called Baijnathpore Durgadas, otherwise Gowasi, which is bounded in the north-eastern and north-western direction by the River Kosi and

(1) JACKSON and TOTTENHAM, *J.J.*

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LUCHMESSUR SINGH v. LILANUND SINGH.

Judgment.

JACKSON, *J.*

intersected by a public road leading from Pudniah to I
The right of ferry which the plaintiff claims is that of c
where the road in question intersects the Kosi in the north-
part of Baijnathpore, the village on the opposite side being
Madhoobani, belonging to the plaintiff. The ghât bears th
of Chunapore. There seems to be no doubt that Chunapo
was a settlement assigned to the plaintiff, and it seems that
ally the landing place on one side of the river was in Madh
and on the other side in Baijnathpore. It is contended t
terly the defendant has commenced plying ferry boats at
to the plaintiff's ghat, and is carrying, not only his own serv
travellers, and this fact appears to be made out by the e
of the plaintiff's witnesses. But, on the other hand,
seems that no tolls are taken by the defendant on account
crossing.

The defendant denied that the plaintiff had any such fer
claimed in the situation which he assigned to it, and also all
the fourth paragraph of his written statement, "To the de
belongs the right of plying ferry boats in the River Kosi
flows through his village Mouzah Baijnathpore Durgadas,
wise called Gowasi. This right was exercised in 1852, 18
1867, and is exercised at present. It is now exercised in th
way as before. No tolls are taken. The boats have been ke
for the convenience of the servants and ryots of the defend
have to go to or come from his zemindari Cutcherri in Pu
He contended, therefore, that the ferry maintained for su
poses could not be closed at the instance of the plaintiff.

In the Court of the Subordinate Judge a question of fa
raised of which the nature has been already indicated, viz., w
the ferry, as now existing, touched on the eastern side up
defendant's village or the plaintiff's. Upon the eviden
after personal inspection, the Subordinate Judge was of
that the land at that particular spot belonged to the pl
He observed that, although the defendant had called witne
show that the spot of land in question belonged to him, no
ment whatever was produced in support of what they sai
in short he did not believe those witnesses. Far from
being the case, it seems that a good many documents, and

of them of an altogether unimpeachable kind, were produced by the defendant; and it appears that there was no particular reason why the witnesses should be disbelieved. But in our opinion that point is not really material if we assume that the point of debarkation at the ferry on its eastern side has been shifted from within the plaintiff's mouzah to a point within that of the defendant. In the first place, if it has happened, it happened many years ago, and has been without objection from the defendant. There can be no doubt that the ferry has been carried on in the same manner as it is now for nearly, if not quite, 20 years, and the ferry in our opinion is, therefore, substantially the same ferry that the plaintiff has owned ever since 1846; and it seems to us too late to contend that in the Courts of this country a zemindar cannot have such a right of ferry arising out of a grant of settlement as that the infringement of that right by reason of the establishment of another ferry at a short distance from it will not give a right of action. Such cases constantly occur, and one is reported in 16 W. R., page 281. The plaintiff's ferry, as I have already stated, is substantially the same ferry as he had years ago. The defendant, in his written statement, says that he maintained boats for the conveyance of his own servants and ryots, but the evidence clearly shows, we think, that those boats were also permitted to transport passengers of other kind, and more especially passengers of the poorest sort. That the defendant took no tolls for the conveyance of such passengers makes no difference, as although the defendant does not gain, the plaintiff loses; for if these persons were not gratuitously taken by the defendant, they would have to pay to the plaintiff, and so far the plaintiff would suffer damage. Mr. Advocate-General, who appears for the plaintiff, does not now contend that the defendant would not be at liberty to keep his own boats for the purpose of conveying his own servants and other persons coming upon his business; and if the defendant proved that the service of the boats which he maintained was limited to that purpose, the plaintiff would have no ground of action. But the fact is otherwise. One cannot help seeing that assertions of his right to carry passengers have been somewhat vaguely but repeatedly set up within the last twenty years. It is quite possible

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LUCHMESSUR SINGH v. LILANUND SINGH.

Judgment.

JACKSON, J.

that, if the plaintiff neglected to notice such infractions of his rights, those might assume very serious proportions. We think, therefore, although not for the reasons stated by the Subordinate Judge, that the plaintiff's suit was well founded, and that he was entitled to a decree and to an injunction restraining the defendant from carrying over the ferry in that place in his boats, whether for hire or otherwise, persons other than his own servants or persons lawfully engaged upon his business or going to his premises. We think the judgment of the Court below should be accordingly modified, and a decree drawn in the terms stated above. The plaintiff will be entitled to his costs of this appeal.

[CIVIL APPELLATE JURISDICTION.]

December 2nd.

No. 184 of 1878.

GUNGAMOYEE DASSEE AND ANOTHER (DECREE-HOLDERS) . . . . . APPELLANTS;

AND

SHIB SUNKER BHUTTACHARJEE AND OTHERS. . . . (JUDGMENT-DEBTORS) . . RESPONDENTS.

Limitation—Act IX of 1871—*Schedule II, Art.* 167—*Final Decree or Order.*

A obtained a joint and several money-decrees against four defendants on the 12th November 1872. One of the defendants preferred an appeal, and the decree, as against him, was set aside by the High Court on the 19th February 1875. Subsequently, on the 1st of August 1876, A sued out execution against the three defendants who had not appealed.

Held, that A's suit was not barred by limitation, as the final decree in the original suit, within the meaning of Art. 167 of Act IX of 1871, was the decree as amended by the High Court on the 19th of February 1875.

APPEAL from an Appellate Order passed by the Officiating Judge of Rajshahye, affirming the order of the first Subordinate Judge of that district.

Baboo *Ishur Chunder Chuckerbutty*, for Appellants.

Baboo *Shoshee Bhooshun Dutt*, for Respondents.

judgment of the High Court (1) was delivered by

IS, *J.*:—

appellants in this case obtained a decree on the 12th nber 1872, by which the present respondents and one an were made jointly and severally liable for a certain f money. The decree was *ex-parte* as against the respond- but not so as against Choitun, who preferred an appeal, as released from his liability by an order of the High , dated February 19th, 1875. Subsequently on the 1st st 1876, the appellants sued out execution against the non- ling defendants, the present respondents.

plea of limitation was set up in bar, and both the lower s have decided it in favor of the respondents. The Dis- Judge, whose order is now in appeal before us, is of opinion though clause 2 of Article 167 of the 2nd Schedule of Act 1871 provides that three years limitation is to run, where has been an appeal, from the date of the final decree or of the Appellate Court, yet it cannot apply to a case such is, where co-defendants, non-appellants, are in no way d by the order on appeal.

see nothing in the terms of the Act to warrant such a con- ion as this. Here the decree was admittedly a joint decree. to the appeal of Choitun, the decree was amended, and mended decree, therefore, became the final decree in the . The Judge is not justified in supposing that there were nal decrees in this suit—one applicable to the non-appealing lants, and the other to the appealing defendant alone.

even if a doubt could exist on this point, the words of the re so wide and comprehensive that the appellants are clearly d to the benefit of their natural import. This is the view as been taken by another Bench of this Court—*In Re Doolley vs. Nirban Sing*, in which precisely the same point was raised ided on June 18th, 1878. Their Lordships say: "There are ifying words as to by whom the appeal is to be made, or he nature of this appeal to be made should be; but simply hen there has been an appeal, the time shall begin to run

(1) MORRIS and PRINSEP, *J.J.*.

1878

GUNGAMOYEE DASSEE v. SHIB SUNKEE BHUTTACHARJEE.

Judgment.

MORRIS, *J.*

from the date of the final decree or order of the Appellate Court The Court is not authorized to make the terms of the Limitation Act more stringent against the decree-holder than they actually are."

We concur in these observations, and accordingly set aside the order of the District Judge, and direct that execution shall proceed.

As to the remark of the Judge that the decree, as being made in a contribution suit, is bad by reason of want of specification of the liability of each defendant, we observe that the Court in execution cannot look behind the decree, and that on the face of it, the decree is a decree capable of execution.

Appellants are entitled to their costs in this Court and in the Courts below.

[CIVIL APPELLATE JURISDICTION.]

Dec. 10th.

No. 2150 of 1870.

BASSUNT LALL DAS . . . (PLAINTIFF,) APPELLANT;

AND

SHEIKH PANA ALI AND OTHERS, (DEFENDANTS,) RESPONDENTS.

Notice—Actual Notice—Act VIII of 1869 (*Beng.*) *section* 14—*Service upon joint brothers.*

Where there is evidence that a notice under section 14 of Act VIII of 1869 has actually reached the persons for whom it was intended, such notice is valid, although the formalities enjoined by the section have not been strictly complied with.

Service of such notice upon two of four joint brothers is good service.

APPEAL from an appellate decree passed by the Judge of Purneah, reversing the decree of the Officiating Moonsiff of that district.

This was a suit for enhancement of rent. In the Court of First Instance an issue was raised as to whether or not notice had been duly served upon the defendants under section 14 of Act VIII of 1869, and upon the facts which are set out in the judgment of the High Court was decided by the former Court in the affirmative. The defendants appealed, and the decision upon

was reversed by the lower Appellate Court. The plain-
ought this special appeal.

e *Mahomed Yusoof*, for Appellant.
aruck Nath Palit, for Respondents.

gment of the High Court (1) was as follows :—

quite unable to concur in the judgment of the lower
Court in this case.

t question which the Judge had to consider was,
e service of notice had been effected on the tenants.

rs that the defendants are four brothers, all of whose
registered, but who are joint holders of the tenure,
proved that a notice had been affixed to the *tatti* of
g in the village of Chappasa, where two of the four
that time were, and that they came out, took down the
read it. But the Judge says that, inasmuch as the
ence of the four defendants was at that time at a place
ari, and the service was not effected at that place, and
e separate service was not effected upon each of the four
ers, so he must declare that service was not made at all.

rs to us that service on the two of the four joint
very good service, and if the service was made at the
e they actually were, and they then and there came
ade themselves acquainted with the contents of the
t was also a good service.

ge is quite right in insisting upon due and formal
notice, but after all, the object is to ensure the notice
ed, and when the evidence shows that the notice has
persons for whom it was intended, it is quite a mis-
clare that there has been no legal service, when in fact
een a service.

ndants, therefore, having been served with notice, and
re having been found not protected from enhancement,
Judge had to do was, to determine what the fair and
rate of rent was. The case will accordingly go back
r Appellate Court. The costs of this appeal will follow

(1) JACKSON and MCDONELL, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

1878 Sept. 3rd. — No. 2530 of 1877.

WUGRA SINGH . . . . . PLAINTIFF;

AND

ABLAKHI KOER AND REWA SINGH . . DEFENDANTS.

Registration—Priority—Bill of Sale—Act VIII of 1871, *section* 50.

A, sold a house to B for Rs. 95; the bill of sale was not registered. A afterwards sold the house to C for Rs. 200; the bill of sale in this case was registered. In a suit by B against A and C for possession of the house; *Held*, that section 50 of the Registration Act, VIII of 1871, did not render the plaintiff's bill of sale invalid as against that of C.

Sheik Reasuttoollah vs. *Doorgachurn Pal*, 24 W. R., 121; and Special Appeal No. 809 of 1877, cited and followed.

APPEAL from an appellate decree passed by the Judge of Patna, affirming that of the third Sudder Moonsiff of that district.

Mr. *R. E. Twidale*, for the Appellant.

Mr. *M. L. Sandel*, and Baboo *Hem Chunder Bannerjee*, for the Respondents.

The facts of the case are sufficiently set forth in the judgment of the Court (1), which was delivered by

MITTER, *J.*

MITTER, *J.*:—

In this case the plaintiff seeks to recover possession of a thatched house on the strength of a bill of sale, dated the 27th of January 1876, executed by Mussamut Ablakhi Koer for Rs. 95. The bill of sale is not registered.

It appears that the principal defendant before us, Rewa Singh was not made a defendant in the case, but was subsequently brought on the record as a party. His defence is, that Mussamut Ablakhi Koer, on the 28th of February 1876, sold the same property for Rs. 200 to him. This bill of sale is a document reg-

(1) MITTER and MACLEAN, *J.J.*

l. These two *kobalas* were executed when the registration in force was Act VIII of 1871. One of the questions raised een the parties was, whether the defendants' *kobala*, being a tered document, was not entitled to priority as against the tiff's *kobala*, which was an unregistered document. There also other questions raised between the parties.

.e Moonsiff dismissed the plaintiff's claim on the ques- of priority under section 50 of Act VIII of 1871. He of opinion that the defendant's *kobala* was entitled to prior- s against the plaintiff's bill of sale. The District Judge has ld that decision simply upon the last ground. He agrees the Moonsiff in thinking that under section 50, Act VIII of , the plaintiff's suit must be dismissed, because the defen- s *kobala*, being a registered document, must take priority the plaintiff's document, which is an unregistered bill of sale. nly point that has been raised before us is, that section 50, VIII of 1871, has no application to this case; because that n refers only to documents, the registration of which is nal.

e think that this contention is valid. Section 50 is as fol- :—"Every document of the kinds mentioned in clauses 1 of section 18 shall, if duly registered, take effect as regards roperty comprised therein against every unregistered docu- relating to the same property." Now, in this case, in order ply section 50 it must be made out that the defendant's nent is one of the kinds mentioned in clauses 1 and 2 of n 18: but it is quite clear that the document does not come n those clauses, because the property in suit was sold to the dant for Rs. 200. That being so, it is quite clear that sec- 0 has no application. This view of the section in question been taken by this Court in the case of *Sheik Reasut-* vs. *Doorgachurn Pal*, 24 W. R., 121. That decision has recently followed by Mr. Justice AINSLIE and Mr. Justice ORD in Special Appeal 809 of 1877, decided on the 14th mber 1877. It is true, as pointed out by Mr. Justice MAC- SON in the case in 24 Weekly Reporter just referred to, the result of this construction of the law is somewhat anom- ; but in a case like this, where the rights of the parties are

1878

WUGRA SINGH v. ABLAKHI KOER.

Judgment.

MITTER, J.

intended to be taken away by a penal legislation of the kind referred to in section 50, the language of the law must be construed very strictly against any derogation of right. We are, therefore, of opinion that section 50 of Act VIII of 1871 has no application to this case.

It has been contended on behalf of the respondent that the matter before us should be governed by section 50 of the present Registration Act. We find that the suit was instituted on the 1st March 1876, and the present Registration Act came into operation on the 1st of April 1877. We, therefore, think that under section 6 of the General Clauses Act (I of 1868) the proceedings in this case having been commenced before the present Registration Act came into operation must be governed by the Act of 1871. We are, therefore, of opinion that this contention is of no force. The judgment of the lower Appellate Court must be set aside, and the case remanded to that Court to be tried upon the remaining question raised between the parties. Costs will abide the result.

[CIVIL APPELLATE JURISDICTION.]

NADIR HOSSEIN, JUDGMENT-DEBTOR . APPELLANT;

AND

J CHAND BASSARAT, JUDGMENT-TOR . . . . . RESPONDENT.

1878 *June 24th.*

No. 80 of 1878.

Order made under Act VIII of 1859—*General Clauses Act,* I *of section* 6—*Act X of* 1877, *section* 3—*Execution of Decree—Act of* 1859, *section* 210.

right of second appeal, where it existed prior to Act X of 1877, exists in the case of any proceedings in execution which were ienced prior to, and were still pending on, the 1st of October 1877. order was made under section 210 of Act VIII of 1859, making gal representatives of a deceased judgment-debtor parties to a n execution of a decree obtained against the deceased in his me. Subsequently the decree-holder discovered that certain rty which he claimed to be the property of the deceased was in ossession of a third person C, and he applied to have C's name put the record and to be allowed to execute the decree against him. *ld,* that the Court had no power to put C's name on the record.

AL from an order of the Judge of Zillah Moorshedabad, the order of the Subordinate Judge of that district.

Bhobany Churn Dutt, for Appellant.
Rashbehary Ghose, for Respondent.

icts of the case are sufficiently set forth in the judgments High Court (1), which were as follows :—

, J. :— MARKBY, *J.*

ms to me that this appeal ought to be heard. The appli- r execution was filed on the 3rd April 1877, whilst the was in force. The decision of the first Court was given ry 1878; the appeal to the lower Appellate Court was l immediately afterwards, and the decision of the lower e Court in appeal was on the 7th March 1878. This as filed on the 22nd March 1878.

(1) MARKBY and PRINSEP, *J.J.*

1878

SYUD NADIR HOSSEIN v. BISSEN CHAND BASSARAT.

Judgment.

MARKBY, J.

If I had to decide this case entirely upon my own opi should have had very considerable doubt whether the would lie. The provisions of section 6, Act I of 1868 always, I think, be read in connection with th which repeals the prior Act, and if the repealin contains any provisions upon the subject which the A repealed related, and goes on to provide when the new pr are to come into force, I think that effect must be given special provision rather than to the General Clauses Act. section 3 of Act X of 1877 provides, after repealing the ol Procedure Code and making provisions with reference t tions which are not now under consideration, that "nothing contained shall affect the procedure prior to decree in a instituted or appeal presented before this Code come force." I believe that we all agree that that clause in effe vides that the new Act shall be applied to proceedings quent to decree and to appeals presented after the ne came into force. But two learned Judges of this Cour having very fully considered this subject, have expresse opinion that notwithstanding anything contained in that of section 3 of the new Code, an appeal will still lie in such as this, by reason of the provisions of section 6 of Act I o

I think that the proper course for me to pursue in this in which it is extremely desirable that the decisions of the should be, as far as possible, unanimous, is to waive any which I have myself on this point, and to follow that exp of opinion. I, therefore, hold that this appeal will lie. T sult of the decision will be, that the right of appeal wher existed prior to Act X of 1877 will exist now in the case proceedings in execution which had been commenced prior 1st October 1877 and were still pending on that date.

PRINSEP, J.

PRINSEP, J. :—

I am also of opinion that a second appeal lies in this cas

MARKBY, J.

MARKBY, J. :—

We think that the decision of the Court below must versed. A decree had been obtained against the deceased

1878

SYUD NADIR HOSSEIN v. BISSEN CHAND BASSARAT.

Judgment.

MARKBY, *J.*

After his death certain persons were put upon the s his legal representatives, and the order making them to the suit under section 210 of Act VIII of 1859 has ome final. Subsequently the judgment-creditor discovered present appellant had property belonging to the deceas- hands. The present appellant is not a relative or in a legal representative of the deceased. The only ground ting him on the record is, that he is in possession of this which is now claimed to be the property of the deceased. not think that any case of this Court has gone so far as that that was a proper proceeding. It may be that if no al representative can be found, the decree-holder may then against persons in possession of the estate belonging to eased. There are at any rate certain observations by Sir PEACOCK in the well-known case of *Issen Chunder Mitter sh Ali Soudagur* (Marshall's Reports, p. 614) which seem that he thought that section 203 was applicable to such s this, but there is no reason why we should extend the legal representative" to the appellant in this case.

great difficulty in these cases generally is to find any per- inst whom the creditor can proceed. That difficulty does st in this case, because here there are proper legal repre- es upon the record against whom the decree-holder can , and if he is right in his assertion that this property in the possession of the appellant belongs to the estate deceased, he can, without putting the appellant's name e record, apply for and obtain an attachment of this pro- n the hands of the appellant. In this case it seems to that was the proper course for the decree-holder to pursue. not think that under the circumstances of this case, there already proper legal representatives upon the record, the ad any power to put the appellant's name on the record

think that the decision of the lower Appellate Court must sed, and the appellant's name must be struck off the ings. The appellant is entitled to the costs of this appeal costs of the Courts below.

[CIVIL APPELLATE JURISDICTION.]

1878
Nov. 20th.
—
No. 1275 of 1878

IN THE MATTER OF RAM SUNKER BHADOORY, PETITIONER.

Limitation—Act X of 1877, *Schedule II, Art.* 171—*Code of Civil Procedure, Act X of* 1877, *sections* 365, 582 *and* 587—*Special Appeal—Death of Appellant.*

A suit was instituted and a decree obtained in the Court of First Instance while Act X of 1859 was in force, but the second decree was made, and the second or special appeal preferred, after Act X of 1877 became law. Pending the hearing of such special appeal, on the 21st April 1878, the plaintiff, who was also appellant, died, and on the 16th August in the same year, or more than 60 days after his father's death, his son and sole heir applied to the Court to be substituted as appellant in place of the deceased, for the purpose of prosecuting the appeal. *Held*, that the application was not made under section 365, but under section 587 of Act X of 1877, as incorporated with the former section, and was therefore not barred by Art. 171, Schedule II of Act XV of 1877.

Where the language of an Act of Limitation specifies the particular cases for which a period of limitation is provided, the Court ought not to interpret that language so as to include cases not falling within the strict meaning of the words used.

THE facts in this case are sufficiently set forth below in the judgment of the High Court (1).

Woodroffe, for the Petitioner.

The judgment of the Court was delivered by

WHITE, J.

WHITE, *J.*:—

This is an application by the son and sole heir of Kali Sunker Bhadoory, who has preferred in this Court a special or second appeal in a suit in which he was plaintiff, and who has died before the hearing, to be substituted as appellant in the place of his father for the purpose of prosecuting the appeal.

The suit out of which this appeal has arisen was filed on the 14th September 1875; the decree of the first Court was made on the 17th April 1876; and that of the lower Appellate Court on the

(1) WHITE and MITTER, *J.J.*

1st December 1877. This appeal was preferred on the 28th February 1878, and Kali Sunker Bhadoory died on the 21st April of the same year. It thus appears that the suit was instituted and the first decree made whilst the old Code of Procedure was the law, but that the second decree was made, and the special or second appeal preferred, after the new Code came in force.

The petitioner did not make his present application until the 16th of August last, and therefore more than sixty days after his father's death. The respondents oppose on the ground that the application is one under section 365 of the new Code, and is, therefore, barred by article 171 of the Limitation Act (XV of 1877) which provides that "an application under section 363 or 365 of the Code of Civil Procedure by a person claiming to be the legal representative of a deceased plaintiff shall be made within 60 days from the date of the plaintiff's death."

Mr. Woodroffe, on the other hand, contends on behalf of the applicant: first, that the present application is not one under the new Code at all, but under the old Code, inasmuch as the suit was instituted whilst the latter Code was in force. It is unnecessary for us to pronounce a decision on this question, for assuming the application to be governed by the new Code of Civil Procedure, we are of opinion that Mr. Woodroffe's second contention is well founded, viz., that the application is not one under section 365 within the meaning of article 171 of the Limitation Act.

The article in its terms applies only to the case of a plaintiff dying, and to the legal representative of a plaintiff, and expressly mentions only sections 363 and 365, as those under which the application is made.

In the case before us the deceased party was an appellant, and the applicant is the legal representative of an appellant. The application is admittedly not made under section 363, and as regards section 365, it is not made under that section alone, but that section incorporated as it is by the Code with sections 582 and 587. The authority in the new Code for making the present application is to be found in the latter section which embodies chapter XLI of the Code, and, therefore, section 582, which is included in that chapter. Section 582 again embodies the

[illegible]

preceding provisions of the Code, so far as they are applicable to appeals, and amongst those provisions is section 365.

It thus appears that the present application is not within the express language of article 171, and we see no reason why we should by construction extend its meaning.

Acts for the limitation of suits as being restrictive of the ordinary right to take legal proceedings are, where the language is ambiguous, to be construed strictly, that is, in favour of the right to proceed—*Jaicramirav T. Bapaji* vs. *Purshotam Sidheshvar* [illegible] Bom. [illegible] p. 111; *Umia Shankar Lukhmiram* vs. *Chot[illegible]* [illegible] Bom., p. 19. For the same reason, where [illegible] the language specifies the particular cases for which a period of limitation is provided, we ought not to interpret that language so as to include other cases not falling within the [illegible] meaning of the words used.

If we were to construe article 171 as extending to the present application, we should introduce some unmeaning distinction into the procedure relating to the substitution in an appeal of the representative of deceased parties. For the Legislature has prescribed no period of limitation for an application made on behalf of a defendant to put the representative of a deceased plaintiff on the record, nor, where the deceased party is a defendant, for an application to be made on behalf of the plaintiff to have the representative of the deceased defendant on the record, or on behalf of the representative himself to be substituted for the deceased defendant.

It is to be observed also that section 5 of the Limitation Act, which gives the Court power, on sufficient cause shown, to admit certain applications after the period of limitation, does not extend to an application of the nature mentioned in article 171. The Legislature may have had a good reason for applying a hard and fast rule of limitation to the representative of a deceased plaintiff when applying in the original suit to be substituted for the deceased; but whatever that reason may be, it cannot apply with equal force in the case of the representative of an appellant who was plaintiff in the Court below.

The plaintiff in the original suit is *dominus litis*, and bound as well as his representative after his death to use reason[illegible]

despatch in bringing the suit to a hearing. But in the Appeal Court, the same plaintiff may be in the position of respondent when the position of *dominus litis* belongs to the defendant, appellant, and neither the plaintiff nor his representative after his death is under any obligation to proceed. In the present case no doubt the plaintiff being also appellant retained the position of *dominus litis* in the Appellate Court, but that is an accident, and does not affect the construction of the article in question.

As we are of opinion that the applicant is not barred by the Limitation Act from proceeding, the only question that remains to be considered is, whether the application is a proper one to be granted. It appears that the granting of this application will not in any way retard the hearing of the appeal. Such being the case, if it is necessary for the applicant to explain why he has applied so late, we think that the circumstances mentioned in the affidavit which he has filed, satisfactorily account for the delay.

The rule will be made absolute with costs.

[CIVIL APPELLATE JURISDICTION.]

1878 June 18th.

No. 819 of 1879

GOLOKE NATH SEN BISWAS . . . . PLAINTIFF;

AND

RAM KANTO DEY SIRCAR . . . . . DEFENDANT.

Account, Suit for – Subsequent Suit—Res Judicata—Limitation—Rent Act—Act VII (B. C.) of 1869, *section* 30.

Plaintiff brought a suit for collection papers against the defendant, his agent, and got a decree. Having received and inspected the papers, he brought another suit for moneys which, he alleged, the defendant had falsely entered as expended. *Held*, that the suit was barred.

Quære.—Whether the Rent Act, section 30, contemplates the bringing of two successive suits, one for an account and the other for the amount due on that account.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Tipperah, reversing that of the Moonsiff of Noorungore.

The defendant was the gomashtah of the plaintiff. He was discharged, and a suit was brought against him for collection papers on an account of 1282, and of some months of 1283, up to 24th of Aughran 1283. The defendant had tendered the papers before the institution of the suit, but the plaintiff objecting to some disbursements had refused to receive them, and on the institution of the suit, the defendant filed them in Court. The papers were taken out by the plaintiff, who, on inspection, found, as he alleged, that the defendant had entered in the account sums which had not been expended, and on the 18th of February 1876, instituted this suit for the amounts—Rs. 90.

The Court of First Instance gave plaintiff a decree which was reversed on appeal as barred by limitation under section 30 of Act VIII (B.C.) of 1869. The plaintiff appealed specially to the High Court.

Baboo *Grish Chunder Chowdhry*, for the Appellant.

Baboo *Hurry Mohun Chuckerbutty*, for the Respondent.

1878

GOLOKE NATH SEN BISWAS v. RAM KANTO DEY SIRCAR.

Judgment.

JACKSON, *J.*

The judgment of the Court (1) was delivered by

ACKSON, *J.*:—

It appears to us that the decision of the lower Appellate Court this case is quite right. It seems that the defendant having rved the plaintiff as gomashtah was discharged, and a suit was first brought against him for papers and accounts. That suit s decided on the 4th March 1875. The papers and accounts re accordingly delivered, and upon examination of those acunts the plaintiff saw reason to think that more was due to him m the defendant than the account showed. Thereupon, on the th February 1876, he brought a second suit to recover what he imed as due. By that time the defendant had been discharged m service nearly three years, but it was attempted to show that is suit was not barred because of fraud. Now the fraud comained of, on being enquired into, turns out to be merely this,— at certain items in the accounts were disputed. That certainly s not a fraud on the part of the defendant which prevented aintiff from being kept from the knowledge of defendant's ceipt of any money. The most that can be said is this,—that he sputed certain amounts alleged to have been spent by the defenant on his account. It may be a question whether the Rent t contemplated the bringing under its provisions, of two successive suits in such a case, one for account and second for the ount due on that account. I should have been inclined to d that what the Legislature intended was, that the plaintiff ould sue for the account and for such sum as he believed to be e upon that account. The separate suit contemplated for the livery of accounts or papers by an agent appears to me to refer something quite distinct, that is to say, to the delivery of papers accounts belonging to the employer which the defendant imperly retains in his possession and the possession of which is ntial to the plaintiff. Therefore, not perhaps altogether on the unds stated by the Subordinate Judge, but clearly on the und that the suit is barred, I think the suit was rightly dised, and this appeal must be dismissed with costs.

(1) JACKSON and TOTTENHAM, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

1878 July 25th. No. 2257 of 1877

HORI NARAIN GHOSE . . . . . DEFENDANT;

AND

THE ADMINISTRATOR-GENERAL OF BENGAL PLAINTIFF.

Limitation—Agent—Account—Refusal to Account—Neglect to Account—Mookhtar.

An account of his receipts and disbursements having been demanded from a mookhtar, he, on the 3rd of August 1872, wrote a letter in which he promised to render full accounts during the ensuing vacation. This he neglected, though he did not refuse, to do. *Held*, that the limitation for a suit to compel an adjustment of account ran from the time when the defendant's promise to render accounts was broken, and was governed by Act IX of 1871, Sch. II., Art 90, (see Act XV of 1877 Sch. II, Art. 90.)

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Mymensingh, modifying that of the Moonsiff of that District.

Baboo *Kashee Kant Sen*, for Appellant.

Baboo *Amarendro Nath Chatterjee*, for Respondent.

The facts are sufficiently set forth in the judgment of the High Court (1), which is as follows :—

The only question raised in this case is that the decisions of the Courts below are erroneous, because the plaintiff's suit should have been held barred by limitation. We think that Article 90 of the second Schedule of Act IX of 1871 is applicable to this case. In this case the plaintiff, as principal, has sued the defendant, who was his agent, to render accounts of certain sums of money paid to him from time to time for the expenses of law suits, &c. The limitation, therefore, must run from the date on which the account is demanded and refused. In this case the lower Appellate Court found that the account being demanded the defendant at first promised to render it during the vacation of 1872, that is in Assin or Kartick 1279, but he never fulfilled his

(1) MITTER and MACLEAN, J.J.

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romise, and therefore virtually refused to render the account at hat time. The present suit is brought on the 15th of June 1875, r Assar 1282, and it is accordingly in time. We, therefore, overule this objection, and dismiss the special appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

EMAMOODDEEN SOWDAGHUR. . . . DEFENDANT;

AND

HAIKH FUTTEH ALI . . . . . PLAINTIFF.

July 19th.

No. 1421 of 1877.

Res Judicata—Question raised, but not decided in previous suit—Title—Leave to bring a fresh suit.

In a suit between A and B a question of title was raised and decided in B's favour in the Court of First Instance, but on appeal the Judge refused to go into it, saying that B might bring a fresh suit. *Held*, that a subsequent suit by B raising the same question was not barred as *res judicata*.

Watson vs. *The Collector of Rajshahye*, 12 W. R., 43, P. C., cited and distinguished.

SPECIAL APPEAL from a decree passed by the Judge of hittagong, modifying that of the Sudder Moonsiff of that istrict.

This was a suit for possession of and establishment of the emrari ryotee right of the plaintiff to certain land, of which the endant was the owner. One Mahomed Ally had an istemrari nsferable right in the land in dispute, and after his death, his ns, on the 31st of January 1860, granted an ijara thereof to the intiff, who shortly afterwards brought a suit for a pottah inst the plaintiff (the superior landlord), and on the 16th of 1865, obtained a decree for a pottah, the term of which was d on the same date as the ijara, namely, the 12th of April . On the 16th of January 1873, plaintiff purchased the of the heirs of Mahomed Ally in the land, and at the hear- f a suit which the present defendant had previously (on the tion of the pottah) brought for direct possession of the land, nt plaintiff pleaded his purchase, and the suit was dismissed.

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EMAMOOD-DEEN SOWDAGHUR v. SHAIKH FUTTEH ALI.

Judgment.

This decision was reversed on appeal, the Judge decreeing the suit on the ground that the pottah had expired, but refusing to go into the question of the right which the present plaintiff might have to possession as the purchaser of the interest of the heirs of Mahomed Ally. To decide this question plaintiff brought the present suit on the 18th of November 1875.

The Court of First Instance decreed the suit, and this decision was affirmed on appeal. Plaintiff then appealed specially to the High Court.

Baboo *Auhkil Chunder Sen*, for Appellant.
Mr. *R. E. Twidale*, for Respondent.

The judgment of the High Court (1) was delivered by

JACKSON, *J.*

JACKSON, *J.* :—

The point raised in this case is one of some little difficulty, but upon the whole we are not disposed to reverse the judgment of the lower Appellate Court. The present plaintiff, some years ago, took from the heirs of one Mahomed Ali, what is called an *ijarah* lease of some lease-hold lands held by them. Having got that *ijarah* he thought it necessary to sue the landlord for a pottah, and he succeeded in obtaining a pottah for three years. On the term expiring, the landlord in turn sued him for possession of the land. He in answer to the suit set up a purchase out-and-out from the heirs of Mahomed Ali, and on this ground the landlord's suit for possession was dismissed by the Court of First Instance. The landlord appealed, and the appeal being heard by the Subordinate Judge, Moulvie Saminuddeen, he found that the pottah under which the defendant had been holding, had come to an end, and he therefore refused to enquire into the question of purchase, and gave the landlord a decree for possession referring the defendant to a separate suit on the ground of his alleged purchase. That suit is the suit now before us. The present plaintiff, upon the leave reserved to him, sues the landlord for possession of the land by the establishment of his right purchase.

(1) JACKSON and TOTTENHAM, *J.J.*

Both the Courts have found the plaintiff's purchase as proved, and have given him a decree for possession. In both of them the now defendant set up the plea of *res judicata*, and contended that by the terms of section 2 of the old Code of Civil Procedure, the plaintiff was barred from maintaining this suit. This plea has been overruled by both Courts, and is now raised again in Special Appeal. The pleader in support of his plea refers to the case of *Watson* vs. *The Collector of Rajshahye*, decided by the Privy Council, reported in 12 W. R., page 43, Privy Council Rulings. That case, in fact, has no bearing on the present. It was one in which the plaintiff not being prepared with his evidence when the original suit was called for hearing, the District Judge dismissed the suit, reserving leave to the plaintiff to bring a fresh suit.

On that occasion their Lordships on the final appeal declined to lay down, positively, that in any case could such a reservation be properly made by a Judge of the Indian Court, but they held that the discretion had been improperly exercised in the particular case. In fact, they went very carefully into the merits of the case, and dismissed the appeal. In the present instance we have no doubt that the Subordinate Judge, when he heard the appeal in 1874, ought to have enquired into the plea set up by the defendant which had been tried and determined in his favour by the first Court. But as he refused to do so, it was also open to the defendant to have brought a Special Appeal to this Court, and although we think he was not well advised in omitting to appeal specially, yet neither the terms of section 2 nor the general principles usually acted upon absolutely precluded the hearing of the present suit. The cause of action now brought before the Court is not precisely one which has been heard and determined by a Court of competent jurisdiction. That in the first suit was a cause of action relied upon by the zemindar who complained that the defendant, holding under him by virtue of a pottah of which the term had expired, refused to give up the land. That suit was based upon a contract long subsisting between the parties, and it was a breach of that engagement which enabled the zemindar to maintain that suit. The present cause of action, although it is one which might have been set up and

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EMAMOOD-DEEN SOWDAGHUR v. SHAIKH FUTTEH ALI.

Judgment.

JACKSON, J.

was set up by way of answer in the previous suit, is distinct, and moreover it was not determined. The Appellate Court, in fact, refused to determine it, and, therefore, in our opinion, the case does not come within the terms of section 2. As to the general principle, it is clear that this plaintiff did all that he could do. He raised a plea on which he claimed to retain possession of the land, but the Court refused to entertain it. Under these circumstances, we think we ought not, in the interests of justice, to hold the plaintiff bound as by an estoppel, but ought to affirm the judgments of the Courts below, which have only given him the benefit of the right which he has made out by the evidence. The Special Appeal is therefore dismissed, but we think there ought not to be any costs of this appeal.

[CIVIL APPELLATE JURISDICTION.]

Dec. 2nd.

CHOWDHRY GOLUCK CHUNDER MASUNTA AND OTHERS (DEFENDANTS), APPELLANTS;

AND

NUNDO COOMAR ROY ... (PLAINTIFF), RESPONDENT.

Title—Adverse Possession—Limitation.

Where a plaintiff claims to be the owner of certain land, by virtue of a particular title coupled with possession adverse to the defendant for twelve years, he is entitled to succeed upon proof of such possession, although he fails to prove the particular title.

Ram Dhun Chuckerbutty vs. *Sreemutty Komul Tara*, 11 W. R., 301, commented upon.

APPEAL under section 15 of the Letters Patent against the decree of TOTTENHAM, *J.*, dated the 9th July 1878, on appeal from appellate decree, No. 91 of 1878.

Baboo *Omakally Mookerjee*, for Appellants.
Baboo *Bhoobun Mohun Dass*, for Respondent.

The facts of this case are sufficiently set forth in the judgment of the High Court (1), which was as follows :—

(1) GARTH, *C. J.*, and MCDONELL, *J.*

points have been raised in this appeal :—

-That as the plaintiff claimed to set aside the order made section 530 of the Criminal Procedure Code in favor of ndant, and to have possession of the property by virtue ncient debuttar title, he was bound to prove, not only had been in possession for upwards of twelve years, but prove the debuttar title which he set up ; and,

.—That the learned Judge in this Court was wrong in ng that there was some evidence of the debuttar title hich the Court below had acted.

e view which we take of the first point, it is not necessary le the second.

irst point, we consider, should be decided in accordance judgment of this Court in the case of *Gossain Dass* vs. *Issur Chunder Nath*, I. L. R., 3 Cal., 225.

plaintiff there claimed possession of certain land under said to have been executed in the year 1857, and he also his plaint that he had been in possession for upwards e years under that deed. The plaintiff failed to prove l, but did prove that he had been in possession of the upwards of twelve years ; and it was contended that the below were wrong in finding in favor of the plaintiff e strength of the twelve years' possession only. It was t, as he claimed under the deed, he was bound to prove that herwise his twelve years' possession would go for nothing. e held in that case that the twelve years' adverse pos- was sufficient to entitle the plaintiff to succeed, and we e distinction, which is equally applicable here, between here the plaintiff sues for a decree, declaring him to be er of property on the strength of some particular title, es where he claims generally the possession of land under lleged title, but coupled with a possession extending over ears or upwards.

e first class of cases, he is not entitled to a decree, declar- to be the owner by virtue of the particular title, unless s that title. It is obviously impossible for the Court to a declaratory decree of that kind, unless he first estab- he title which he sets up.

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CHOWDHRY GOLUCK CHUNDER MASUNTA v. NUNDO COOMAR ROY.

Judgment.

But in the latter class of cases, whether he proves the origin of his title or not, if he can show a twelve years' continuous adverse possession as against the defendant, that is quite sufficient by the law of this country to give him a title of itself.

The present case appears to us to be clearly one of the latter character. Here the plaintiff claims by virtue of an ancient debuttar title, but he says also that he and his father have continued in possession for a much longer period than twelve years under that title. Assuming then that he has failed to prove the debuttar title, the Court below has found that he and his father have been in possession for upwards of twelve years, before proceedings were taken under section 530.

The case in the 3rd Vol. of the Indian Law Reports is therefore directly in point, and for the reasons given there, we consider that the plaintiff is entitled to recover in this suit.

The case cited to us from 11 W. R., p. 301, which was decided by the late Mr. Justice BAYLEY and Sir CHARLES HOBHOUSE, certainly seems opposed to that view, but the distinction to which we have alluded does not appear to have occurred to the learned Judges in that case, and we believe that the rule upon which we are now acting is one which has been generally adopted by this Court of late years. There are certainly several recent authorities in favor of it, and it seems to us quite in accordance with good sense and justice.

The appeal will be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

JSSAMUT BEBEE KHOOBUN (PLAINTIFF,) APPELLANT;

AND

OOMA CHURN SINGH AND OTHERS . . . . . (DEFENDANTS,) RESPONDENTS.

1878 Dec. 10th.

No. 2365 of 1877.

tition by Collector—Private Partition—Butwara Proceedings—Cause of Action—Act VIII of 1859, *section* 15.

Where there had been a private partition of an estate and the several shareholders had held their lands in accordance therewith, an application was made by some of the shareholders to the Collector to have a fresh partition made as if the whole lands were held jointly. Plaintiff, who was also a shareholder, objected, but his objection was overruled. Thereupon he brought a suit for confirmation of the partition and for an injunction to stay the partition pending before the Collector.

Held, that the plaintiff's cause of action against the defendants arose upon their moving the Collector to interfere with the first partition, and that the period of limitation in respect of such cause of action was the same as in any other suit for determining the rights of parties to immoveable property.

A Civil Court cannot interfere by injunction to restrain a Collector's power of partition, but where, as between the several shareholders, the extent and nature of the share of each has been determined, the latter is bound to recognize such determination, and to give effect to it by carrying out the partition if the parties apply for it.

PPEAL from an appellate decree passed by the Officiating lge of Patna, affirming the decree of the Subordinate Judge that district.

Mr. *R. E. Twidale* and Moonshee *Mahomed Yusoof*, for Appelt.

Mr. *M. L. Sandel*, for Respondents.

The facts of this case are sufficiently set forth in the judgt of the High Court (1), which was as follows :—

The case of the plaintiff is simply this. That many years ago there was a private partition of Mouzah Chuck Radaram and

(1) AINSLIE and WILSON, *J.J.*

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MUSSAMUT BEBEE KHOOBUN v. WOOMA CHURN SINGH.

Judgment.

Kaishopoor Digha, in accordance with which the several shareholders have been holding separate possession of particular portions of land; and that recently some of the shareholders applied to the Collector to have a partition of the estate made as if the whole of the lands were held jointly. The plaintiff objected, but his objection was overruled, and the Collector proceeded to make a fresh partition. The plaintiff, therefore, asks for confirmation of the private partition and for an injunction to stop the partition at present pending before the Collector.

In respect of the latter prayer it may be observed that Civil Courts do not interfere with the Collector's power of making a partition. All that they can do is to determine as between several shareholders the extent and nature of the share of each. This determination the Collector is bound to recognize and give effect to in carrying out the partition if the parties who have applied for it choose after such determination to go on with their application. If this statement of the plaintiff is true that there had been a private partition, and that an application was made to the Collector to do that which would result in an interference with that private partition, they clearly had a cause of action against the defendants in respect of their having moved the Collector so to interfere with the plaintiff's rights and disturb his possession; and in respect of this cause of action it seems to us that the period of limitation would be the same as in any other suit for determining the rights of parties to immoveable property. The present suit is not barred by limitation.

The Courts below have found as a fact that there was a private partition, and that the shareholders in the estate have held their lands in accordance therewith. This being so, the order of the lower Appellate Court dismissing the appeal and thereby confirming the order of the first Court which dismissed the suit was wrong, and ought to be set aside. The Judge has, in fact, while dismissing the suit, made a declaration under the provisions of section 15 of Act VIII. If he thought fit to do this, it is quite clear that the form of his order was wrong, and he ought not to have dismissed the appeal, but to have allowed it.

The question whether the plaintiff is entitled to his costs in which to a certain extent is raised by the fifth paragraph of

itten statement of Petumber Singh and others at page 8 of the ›er-book; but that statement is defective, in that it does not out the date of the order referred to, and so much of the pur- :t of it as is necessary to explain the answer of the defendants. t even supposing that the order of the Revenue Court is of an lier date than the 12th January 1876, the date of the filing the plaint in this case, it does not at all follow that the plaintiff s not entitled to go to the Civil Court to get a declaration ich should be binding not only in a particular case, as is the ler of the Revenue Court, but binding generally on all persons :erested in the estate, so as to guard himself against being noyed by further proceedings similar to those taken in the ›sent instance.

We think, therefore, that the present appeal should be allowed th costs; and that the order of the Court below should be ried, and it should be declared that the plaintiffs are enti- d to succeed in the appeal in the Court below and to the costs :urred in that Court, and to obtain a declaratory decree in the ›ms set out in the judgment of that Court. We further declare at the Collector is not at liberty in any proceedings under the twara law to vary the terms of the original partition.

[CIVIL APPELLATE JURISDICTION].

1878 Dec. 21st.

No. 264 of 1877.

TILUCK CHAND BABOO . . . (DEFENDANT) APPELLANT;

AND

SOUDAMINEE DASSEE . . . . (PLAINTIFF) RESPONDENT.

Mesne Profits—Wrongful possession—Amount recoverable.

A, having obtained a decree against B for possession of certain property, instituted a suit for mesne profits for the time during which B had been wrongfully in possession. The latter having proved that he had paid for Government revenue in respect of the property sums in excess of the rents received by him, this suit was dismissed. Thereupon, B brought a suit against A to recover the amount so paid in excess of the rents received. *Held*, that such a suit would not lie, as A had been a trespasser, and must bear the burthen of his own wrong.

Doe vs. *Hare*, 2 C. and M., 145 cited and followed.

REGULAR APPEAL from a decision passed by the Judge of East Burdwan, dated the 4th of June 1877.

Baboo *Taruck Nath Sen*, for Appellant.

Baboo *Rash Behary Ghose*, for Respondent.

The facts in this case are sufficiently set forth in the judgment of the High Court (1), which is as follows :—

In this case the judgment of the Court below has proceeded upon an erroneous view of the law. The facts are these :—On the 12th of August 1868, the plaintiff purchased certain property at an execution sale, and obtained possession of it. The defendant had purchased the same property at another execution sale, three days before the plaintiff's purchase. In the year 1870, the defendant brought a suit against the plaintiff to recover possession and succeeded, the final decree in that case being pronounced in the High Court, on the 23rd of August 1872. He then, in 1873, brought a suit against the present plaintiff for mesne profits during the three years that she had been in possession, viz., from 1869 to 1872, and in that suit the defendant (the

(1) GARTH, *C.J.*, and TOTTENHAM, *J.*

present plaintiff) set up a counter-claim by way of set-off for sums which she had paid for Government revenue during the time that she was in possession. Upon the strength of this set-off, the Court of First Instance not only dismissed the plaintiff's suit for mesne profits, but gave the defendant (the present plaintiff) a decree for Rs. 1,077-12-8, being the difference between the rents received, and the revenue paid, for the property during the three years. That decree was reversed by the High Court upon appeal, who held, (Justices MARKBY and MITTER), that although the defendant in that suit had a right, in answer to the claim for mesne profits, to show that the payments for revenue equalled or exceeded the amount of her collections, so that in fact she had made no profits at all, still she could only use those payments by way of deduction or allowance, and could not treat them as a set-off under section 195 of the Civil Procedure Code. In truth, the suit for mesne profits is a suit for damages, and the High Court held, that although the payments of revenue might be used to reduce those damages, they could not be treated as a substantive set-off.

The present plaintiff then brought the suit to recover the same sum of Rs. 1,077-12-8, which she had failed to obtain by way of set-off in the former suit, and an additional sum of Rs. 457-0-12, by way of interest.

The issues fixed by the District Judge substantially raised two main questions: first, whether the plaintiff had a right to recover pay, and if so, what amount; and, secondly, whether the suit was barred by limitation.

The Judge held that as the plaintiff, whilst in possession, was obliged to pay the revenue to protect the property from sale, the sums thus paid by her must be considered as having been expended for the benefit of the defendant, as soon as he established his right to the property, and that the plaintiff was, therefore, entitled in equity to recover those sums from him, less the amount of any profits which the plaintiff might have received.

He further considered that those payments could not be said to have been made for the defendant's benefit, until he had recovered possession of the property, and that, therefore, the plaintiff's cause of action did not arise till then; and he held, that the

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TILUCK CHAND BABOO v. SOUDAMINEE DASSEE.

Judgment.

claim was not one for money paid by the plaintiff for the defendant's use, (in which case under article 59 of the Limitation Act, the suit ought to have been brought within three years), but that the suit was founded upon an equitable right, which the plaintiff had to be recouped the amount of revenue which she had paid for the defendant's benefit, under the impression that she herself was the true owner of the property, and that therefore the case came under article 118 of the Limitation Act, as being one for which no special period was elsewhere provided.

It is unnecessary for us to consider the point of limitation, as we think that upon the first and main question the decision of the District Judge is manifestly erroneous. He seems to have entirely lost sight of the fact, that the plaintiff, although she might have supposed that she was the lawful owner of the property, was really in the eye of the law a trespasser and wrongdoer in holding possession of it against the defendant, and that whatever sums she might have paid in respect of it, while she was thus in possession, were paid in her own wrong. She had no right, legally or equitably, to intermeddle with the property at all, and it is not because payments which she has made may have inured to the benefit of the rightful owner, that the latter is bound to recoup her for those payments. If A pays B's debts, supposing he has authority to do so, but in fact having no such authority, he cannot recover the amount against B; and if A innocently obtains possession of B's horse, and wrongfully holds possession of it, believing that he has a right to do so, he cannot claim from B the price of food or medicine which he may have supplied to the horse, although the horse would have died without such food or medicine, and B alone may have benefited by A's expenditure.

The right which a defendant has, who is sued for mesne profits, to deduct any necessary payments which he may have made from the amount of his receipts, depends upon a different principle which is explained in the case of *Doe* vs. *Hare*, 2 C. & M., 145, cited in the notes to *Lampleigh* vs. *Braithwaite*, 1 Smith's Leading Cases (7th edition), 171. In a suit for mesne profits, the plaintiff is only entitled to recover the actual loss which he

has sustained by being kept out of possession, and therefore in ascertaining the amount of such loss, it is right to take into consideration the receipts on the one hand, and the necessary payments on the other. But it does not follow from this, that if a man has wrongfully taken possession of property, and held it adversely to the true owner, and has been a loser in consequence, he has right to recoup himself for his losses as against the true owner. He must be content in such case to bear the burthen of his own wrong.

The judgment of the Court below must, therefore, be reversed; the plaintiff's suit dismissed with costs in both Courts; and the defendant must be held free from the terms as to interest and otherwise, under which he was placed by the lower Court.

[CIVIL APPELLATE JURISDICTION.]

IARI MOHUN MULLICK. . . (DEFENDANT,) APPELLANT;

AND

IOBURDHUN DASS . . . . (PLAINTIFF,) RESPONDENT.

August 7th.

No. 1958 of 1877.

Jurisdiction—Cause of Action—Place of suing—Performance of Contract—Forum.

Plaintiff delivered to the defendant at the latter's factory at Cossipore fifty maunds of indigo seed. It was agreed that payment should be made at plaintiff's place of business within the limits of the Moonsiff's Court at Krishnagur. *Held*, that the latter Court had jurisdiction to entertain a suit for the price of the seed.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Nuddea, reversing that of the Sudder Moonsiff of the District.

Baboo *Rajendronath Ghose*, for the Appellant.
Baboo *Unnoda Prosad Banerjee* and Baboo *Rash Behary Ghose*, for the Respondent.

The plaint in this suit was filed on the 21st December

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HARI MOHUN MULLICK v. GOBURDHUN DASS.

Judgment.

MITTER, *J.*

1875. The facts of the case are sufficiently set forth in the judgment of the Court (1), which was delivered by

MITTER, *J.* :—

In this case the first objection that has been raised is that the Moonsiff's Court of Krishnagur had no jurisdiction to entertain this suit. The finding of the lower Appellate Court upon which the decree of that Court is based is to the following effect :—That the plaintiff wrote a letter to the defendant offering to deliver indigo seed at the defendant's factory at Cossipore, and requesting him that if he approved of the seed he might take what quantity he required; and that two days after that letter was written fifty maunds of indigo seed were delivered at the defendant's koti at Cossipore. The lower Appellate Court has found that this delivery was accepted by the defendant, and that from the ghat those fifty maunds of indigo seed were carried to the koti with the defendant's knowledge and consent. The Subordinate Judge thinks that there was a complete sale, by the plaintiff's offer to sell indigo seed and the defendant's accepting of the delivery of it at his koti. The Subordinate Judge is further of opinion, that there was an implied understanding between the parties that the value of the indigo seed was to be paid at the plaintiff's koti at Krishnagur. He is also of opinion that there was an implied warranty in the contract for sale, and that that warranty was, that if the defendant approved of the seed he might retain the quantity delivered, otherwise he was at liberty to return it. But upon the evidence the Subordinate Judge comes to the conclusion that this condition as to the warranty of articles sold was not broken by the plaintiff, or, in other words, the defendant failed to prove that the seed was not of such a nature as would come within the description of them given in that letter. Upon these findings of fact the lower Appellate Court has given the plaintiff a decree for the value of the fifty maunds of indigo seed delivered at the koti of the defendant at the rate mentioned in the plaintiff's letter. We think that upon this state of facts the Moonsiff's Court at Krishnagur had jurisdiction to entertain the suit. In *Gopi Krishna Gossami* vs. *Nilkomul Banerjee*, reported in

(1) MITTER and PRINSEP, *J.J.*

B. L. R., 461, the following principle was laid down by Mr. Justice MARKBY :—" Where no place for the performance of a contract is prescribed in the agreement or exacted by the necessities of the case, the place where it is intended by the parties such contract should be fulfilled ought to supply the forum." Now in this case it was intended that the contract, namely, the payment of the money, should be fulfilled at Goarhi. Therefore following the principle laid down in that case, we think that the Krishnagur Moonsiff's Court had jurisdiction to entertain this suit.

Another objection has been taken by the defendant to the judgment of the lower Appellate Court, viz., that upon the facts found, the lower Appellate Court was not right in law in holding that there was a complete sale under section 78 of the Contract Act. We do not think that there is any force in this objection. The facts found go to show that the plaintiff offered to sell indigo seed to the defendant on certain conditions ; the defendant accepted the offer, and took delivery of 50 mauuds at his koti. These facts clearly constitute a sale within the meaning of section 78.

We are, therefore, of opinion that there is no ground made out in this case for our interference with the judgment of the lower Appellate Court, and we dismiss the special appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1878
Dec. 13th
No. 760 of 1878

SHODON MOHALDAR AND ANOTHER . . . . . (DEFENDANTS,) APPELLANTS;

AND

ROMEZAN MOHALDAR . . (PLAINTIFF,) RESPONDENT.

Act XXVII of 1860—*Assignee by Devise—Probate.*

A suit by a plaintiff representing his minor son, by virtue of a certificate under Act XL of 1858, will not lie, to recover money due upon a bond executed by defendant in favour of a testator by whom it has been bequeathed to such minor son, unless the plaintiff have first taken out probate of the will or obtained a certificate under Act XXVII of 1860, to realize the debts belonging to the estate of such testator.

Baboo *Saroda Prosunno Roy*, for Appellants.
Baboo *Hurry Mohun Chuckerbutty*, for Respondent.

The facts of the case sufficiently appear from the following judgment of the High Court (1), which was delivered by

MORRIS, *J.*

MORRIS, *J.* :—

This special appeal raises an important question as to the right of the representation of an assignee by devise of a debt to sue to recover the debt without having first taken out probate of the will of the deceased testator, or having obtained a certificate under Act XXVII of 1860 to realize the debts belonging to his estate.

The plaintiff in virtue of a certificate under Act XL of 1858 represents his minor son to whom, he says, one Bachoo Mohaldar has bequeathed certain properties by will, amongst others a certain mortgage bond alleged to have been executed by the defendant, and he sues to recover the money due upon this bond. The defendant resisted the suit on various grounds, amongst others, that no probate had been taken of the will of Bachoo Mohaldar, and

(1) MORRIS and PRINSEP, *J.J.*

at without such probate or a certificate under Act XXVII of 60, the plaintiff could not, under the terms of section 2 of the t, compel him to pay the debt.

The first Court dismissed the plaintiff's suit; but the Subordi- te Judge, on appeal, gave the plaintiff a decree. Held, that as will is the will of a Mahomedan, probate need not under the be taken of it. Then as to the objection under section 2, t XXVII of 1860, he says, that the plaintiff by holding a certi- ate under Act XL of 1858 is entitled to sue to recover property behalf of his son, and that therefore he is entitled to obtain ecree in this suit, but that he cannot recover the money due der the decree without first obtaining a certificate under Act VII of 1860.

We think that the Subordinate Judge is wrong in giving the intiff a decree such as this. He cannot give a decree which its terms authorises the recovery of a sum of money due on ebt, and at the same time saddle it with the condition that it not be enforced until a certificate under Act XXVII of 1860 been obtained. He overlooks the fact that no certificate ld be granted until the plaintiff had proved his title to it, l this would involve the opening up of questions similar to se raised in the present suit as to the validity of the will and status of the plaintiff's son under it. The terms of sec- 2, Act XXVII of 1860, are clear. It provides: "No debtor any deceased person shall be compelled in any Court to pay debt to any person claiming to be entitled to the effects any deceased person or any part thereof, except on the duction of a certificate to be obtained in manner hereinafter ntioned, or of a probate or letters of administration, unless Court shall be of opinion that payment of the debt is withheld m fraudulent or vexatious motives, and not from any reason doubt as to the party entitled." Here there is no ground aying that payment of the debt is withheld from fraudulent xatious motives. On the contrary, as shown by the Moon- in his judgment, reasonable doubt exists as to the validity e bequest under the will. The debtor is placed by this in a false position, inasmuch, as he cannot be expected to

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know anything of the circumstances attending the execution of the will of Bachoo Mohaldar. It is only after notice has been served upon the application of the plaintiff under Act XXVII of 1860, that the heirs of Bachoo Mohaldar, or others interested in his estate, can properly contest the title of the plaintiff to collect this debt as a debt due to the estate of the deceased which he devised to the plaintiff's son.

We set aside the judgment of the Subordinate Judge, and for the reasons stated dismiss the suit. We express no opinion on the merits of the case.

The suit is dismissed with costs in all the Courts.

[PRIVY COUNCIL.]

[OTAY LALL . . . . . APPELLANT;

AND

:UNNO LALL AND OTHERS . . . . . RESPONDENTS.

Hindu Law—Daughter's Estate—Stridhan—Mitakshara—Jain Law.

Under Mitakshara law a daughter takes only a qualified and restricted estate in property inherited from her father, and upon her death the heirs of her father and not her own heirs are entitled to succeed to such property.

Where a custom of the Jains is relied upon, it must be proved like any other custom varying the ordinary law.

PPEAL from a judgment of the High Court of Calcutta affirm- a prior decision of Mr. Justice PONTIFEX of that Court.

'he judgment appealed against will be found reported in 14 L. R., 235.

Cowell, for Appellant.

Cowie, Q.C., and *Doyne*, for Respondents.

The facts are sufficiently set forth in the judgment of their rdships of the Privy Council (1), which is as follows :—

This suit was brought by the respondents, the plaintiffs below, try the right to considerable moveable property which was en into the hands of the Ad ministrator-General on the death Lukhy Bibee, the wife of the appellant, who was the defen- it below. The property in suit was the self-acquired property Thakoordass Baboo, who died at Calcutta on the 13th Feb- ry, in the year 1860, without any male issue or widow, but ring an only daughter, Lukhy Bibee. This daughter was ried in November 1863 to the defendant, and died on the 4th tember 1872 without issue, her husband, the defendant, sur- ng her. The plaintiffs are grandsons of a brother of Thakoor- s, and it is admitted that they would have been the heirs of

(1) SIR JAMES COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH and SIR ROBERT P. COLLIER.

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Thakoordass if he had left no issue. The question now is, whether they or the defendant, as the husband of Lukhy Bibee, became entitled to the property in question upon her death.

The first question which has been argued relates to the law which governed Thakoordass and his family at the time of his death. Thakoordass was a native of the North-West Provinces, and came to reside in Calcutta in 1814, and lived there until his death. It is the common case of both parties that he retained the personal law of the place of his birth. He appears to have belonged to the sect of Jains, and the first contention of the learned counsel for the defendant is, that the right of succession must be determined by the customs of the Jains, that those customs have not been ascertained, and that the suit ought to be remanded for the purpose of ascertaining them.

The proceedings in the suit as to an enquiry into these customs certainly assume a somewhat singular shape, and the parties have apparently changed sides with regards to it in the course of the suit. The plaint in the first paragraph thus describes Thakoordass. "One Thakoordass Baboo, of the race or sect of Jains, and a resident of the North-West Provinces of India, on or about the year of Christ 1814, came to Calcutta, and there remained until his death, retaining and following the usages of his said sect." The written statement of the defendant in the 9th paragraph contains this passage:—"The said Thakoordass Baboo, deceased, was, and the plaintiffs and the defendant are, governed by the Mitakshara law of inheritance which obtains at Behar in the North-Western Provinces of India." That is a distinct and simple assertion that the family was governed by the law of the Mitakshara. There is no allegation that that law was modified by any custom of the Jains. This being the original allegation of the defendant, now that the right has been decided according to the law of the Mitakshara which he had invoked, he turns round and alleges that this is wrong, and that the succession ought to be determined by the usage and custom of the Jains. Mr. Cowell, who very ably argued the case, has done all that possibly could be done to find a foundation for this contention, but the case does not really afford, when it comes to be examined, sufficient materials for the purpose.

The point arises in this way: Issues were settled, the first and second of which were—"First, was Thakoordass a Jain; if so, what is the law of succession applicable to Jains?" At the hearing of the cause before Mr. Justice PONTIFEX, the Advocates of both parties proceeded to consider the effect of the Mitakshara law as bearing upon the trial of these issues, and the contention was stated by the Judge in his judgment thus:—Having stated the issues, he says: "But Mr. Kennedy, on behalf of the plaintiffs, insists that under Mitakshara law, apart from any peculiar law of inheritance affecting the succession to property among Jains, the deceased Lukhy Bibee took only a qualified interest in the property in dispute, which interest was not transmissible to her heirs; but upon her death the property reverted to the next heirs of her father; and it was not disputed on behalf of the defendants that the plaintiffs would be entitled to the property in question in this suit if it was established that under the Mitakshara law a daughter does only take a qualified estate in her father's descended property similar to the qualified estate of a widow." It is important to observe what was then not disputed by the defendant's advocate? The judgment proceeds as follows: "Mr. Evans, on behalf of the defendants, nevertheless insisting that under the Mitakshara law the daughter takes an absolute interest in property descending to her from her father, which interest on her death descends to her own heirs and not to the heirs of her father. Under these circumstances of the case, I consider it right that the question of inheritance and Mitakshara law should be argued before trying the issues above referred to." In consequence of the line thus taken by the Advocates of the parties, Mr. Justice PONTIFEX, having heard their arguments on this question, decided that by the law of the Mitakshara the daughter took a restricted estate only. The defendant appealed to the High Court from that judgment. Their Lordships have looked through the memorandum of appeal, and they find no objection or complaint on the ground that Mr. Justice PONTIFEX had not tried the issues as to the customs of the Jains. When the case came before the High Court it directed the case to be remanded for the trial of these issues. The reasons for this judgment do not appear upon

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the record. The Court probably acted on its own motion, desiring to be informed upon those issues; for the remand was certainly not warranted by any objection appearing in the grounds of appeal.

On the trial of these issues two witnesses only were called. Neither side appears to have gone into evidence as to the customs of the Jains, or to show that the rule of inheritance amongst the sect of Jains, to which Thakoordass and his family belonged, was different from the ordinary law. Mr. Justice PONTIFEX, who heard the evidence, found upon it that, although the father was a Jain, the case was governed by the law of the Mitakshara, and the judgment of the High Court, now appealed from, has proceeded upon that finding.

The plaintiffs objected to the finding on the above issues. Their objection was, that the learned Judge in the Court below was wrong in holding that the case was governed by the Mitakshara law, and that he ought to have held that the case was governed by the Hindu law of the Bengal school; and, secondly, that if it were not so governed, it was governed by the Hindu law of the Benares school. Those objections were taken by the plaintiffs in the belief that the law of the schools they referred to would be more favourable to them than the law of the Mitakshara; but what is material on the present point, and why attention is now called to these objections is, that the defendant did not object to the finding of the Judge upon the ground that the Judge ought to have gone into the evidence as to the laws and customs of the Jains. By the Code of Procedure, section 354, if the defendant meant to insist that the laws and customs of the Jains had not been ascertained, he ought to have objected at that time. The section is clear: "Either party may, within a time to be fixed by the Appellate Court, file a memorandum of any objection to the finding, and after the expiration of the period so fixed, the Appellate Court shall proceed to determine the appeal." The defendant, having that opportunity of objecting, did not think fit to do so, and accordingly the High Court proceeded to consider the case upon the law of the Mitakshara.

Mr. Cowell ultimately argued the case, as if it was to be assumed that all Jains were governed by customs with r

inheritance differing from the ordinary law, and he suggested that a case, which was recently before this tribunal, supported that view. The case he referred to is *Sheo Singh Rai* vs. *Mussumat Dakho and another*, L. R., 5 I. A., page 87; but their Lordships think that that case does not support it. On the contrary, the effect of that case is, that the customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and that in the absence of proof the ordinary law must prevail. If Mr. Cowell's argument is right, it would be only necessary that a man should be found to be a Jain to establish the conclusion that the ordinary law did not apply to him. The contrary is certainly to be inferred from the decision of this Board.

As this argument was rather strongly pressed by Mr. Cowell, it will be well to refer to some passages in the judgment in that case. In page 107, in commenting upon the judgment of the High Court, it is said: "The Judges then proceed to an elaborate review of the decisions in India, in which the laws and customs of the Jains have been considered. It appears to have been contended before them—to use the words of the Court—that the applicability to Jains of the laws of the Brahminical Hindus, or what is generally termed Hindu law, had been established by so many rulings that the Court was bound to apply it to this case; and, further, that no uniform and consistent body of customs and usages existed among the Jains which would enable the Court to affirm that the general law was modified by them. It certainly appears that, in most of the decisions referred to by the Judges, the Courts had held that there was no sufficient proof of the existence of special customs among the Jains to displace or modify the general law, though in others, where sufficient proof of special customs appeared, effect had been given to them. Their review of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the Jains might be governed, as to some matters, by special laws and usages, and that where these were satisfactorily proved, effect ought to be given to them. The learned counsel for the appellant, who argued the case at their Lordships' bar, felt

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himself unable to dispute the correctness of this conclusion." Their Lordships proceed to say: "It would certainly have been remarkable if it had appeared that in India, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed to usages and customs differing from the ordinary law, whether Hindu or Mahomedan, the Courts had denied to the large and wealthy communities existing among the Jains the privilege of being governed by their own peculiar laws and customs, when those laws and customs were, by sufficient evidence, capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise." The result of the decision is stated in the following passage: "In the present case, their Lordships consider that the Judges of the High Court were right in thinking that their decision should be governed by the evidence taken in this suit." This decision did no more than adopt and affirm the law, to be deduced from a long roll of cases in India, that when the customs of the Jains are set up, they must be proved like other customs varying the ordinary law, and that, when so proved, effect should be given to them.

The result of a review of the proceedings in the present case is, that the defendant cannot now impeach the judgment appealed from, on the ground that the customs of the sect of Jains, to which this family belong, have not been ascertained.

The remaining question is, whether the High Court has taken a correct view of the law, which is now assumed to be that of the Mitakshara, in holding that Lukhy Bibee's right was a qualified right only, and not an estate of the nature of *stridhan*. The law of inheritance in the case of women has been recently declared in the case of a widow by two decisions of this Board. Both are to be found in 11 Moore's Indian Appeals. The first is *Massumat Thakoor Deyhee* vs. *Rai Baluk Ram and others*; and the other is *Bhugwandeen Doobey* vs. *Myna Baie*, page 487. After a very full consideration of the authorities, and in two elaborate judgments discussing at length those authorities, this tribunal decided that, under the law of the Mitakshara, a widow's estate, inherited from her husband, is a limited and restricted estate only.

After these decisions the question is reduced to the point, hether a daughter, inheriting from her father, stands in a higher d different position from that of a widow? Reliance has been aced on the often-cited text in the Mitakshara relating to oman's property. The words most relied upon are contained, t in the text, but in an interpretation of the text. The 11th ction of the 2nd chapter, paragraph 1, défines what is woman's operty. The important part of the paragraph is: "The thor now intending to explain fully the distribution of woman's property, begins by setting forth the nature of it: What was given to a woman by the father, the mother, the sband, or a brother, or received by her at the nuptial fire, presented to her on her husband's marriage to another wife, also any other (separate acquisition), is denominated a woman's operty.' " It seems that the word in the original text "any her" is "*adi*," and that the proper translation of the word uld be "or the like," so that the passage ought to be read r received by her at the nuptial fire, or presented to her on r husband's marriage to another wife, *or the like*." The interetation gives a more specific definition, and instead of "or e like," these are given the words which have been so often ed, and have given occasion to so much discussion. "Also perty which she may have acquired by inheritance, purchase, rtition, seizure, or finding, are denominated by Menu, and the , woman's property." The original text does not afford foundation for the argument in favour of the right of the ow and daughter to the entire interest in land acquired by ritance; the interpretation, no doubt, does. No decision this tribunal has been referred to with regard to the estate by the daughter inheriting from her father, but the argu- which were pressed at their Lordships' bar in the present by Mr. Cowell were presented and fully developed in the r cases before this tribunal relating to widows. The s by which these arguments were answered in the judg- of the Court—reasons which it is not necessary to —are, for the most part, applicable to the case of a hter.

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But their Lordships cannot regard the question of the daughter's estate as "*res integra.*" It has been the subject of numerous decisions in India. The Indian authorities are carefully collated in the judgment of Mr. Justice PONTIFEX and of the Judges of the High Court. The result appears to be that the Courts in Bengal and Madras have determined, in a series of decisions, that the daughter takes a qualified estate only. No doubt in the Courts of Bombay, there have been rulings and *dicta* in favour of the view that she takes the entire property. Their Lordships do not think it necessary, especially after their own decisions as to widows' estates, to go into an examination of the Indian cases. They agree in the conclusion of the High Court, which affirms that which was stated many years ago to be the law by Sir WILLIAM MACNAGHTEN in his Treatise on Hindu Law, page 22, in these terms: "But though the schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death in default of issue (male). According to the law, as received in Benares and elsewhere, it does not go as *stridhan* to her husband or other heir, and according to the law of Bengal also it reverts to her father's heirs."

With regard to the case, most relied upon in the High Court of Bombay, it would seem to have been there admitted, that, after the decisions which have taken place, the daughter's estate, according to the Benares school, was only a restricted one. The family of Thakoordass is apparently governed by the law of that school. Certainly it is not governed by the law of the Mayukha, which was held to be the governing law in the Bombay case.

Their Lordships may observe that the authorities are collected and discussed in Mr. Mayne's learned Treatise on Hindu Law.

Their Lordships think that, after the series of decisions which has occurred in Bengal and Madras, it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts; and they agree in the observations which are to be found at the end of the judgment of the High Court, that Courts ought not to unsettle a rule of inheri-

ance affirmed by a long course of decisions, unless, indeed, t is manifestly opposed to law and reason. They do not think his rule is opposed to the spirit and principles of the law of he Mitakshara: on the contrary, it appears to them to be in ccordance with them. The result is, that they will humbly dvise Her Majesty to affirm the decree appealed from, and to ismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

LAKMONI DEBI . . . . . APPELLANT;

AND

ANIMADHUB CHUCKERBUTTY & ANOTHER. RESPONDENTS.

le in execution of Decree—Debts of Ancestor—Representatives, Decree against—Hindu Widow, Decree against—Personal Decree—Minors.

In a suit against a Hindu widow described in the plaint as "widow of Anund Mohun Surma Roy, deceased, and mother of Denobundhu and Bepin Chunder Roy, minors," for a bond debt due by her late husband, a personal decree was given against the widow. There was nothing contained in the decree to show that the debt had been incurred by any person other than the widow. In execution of the decree a sale was made of the right, title and interest of the judgment-debtor in property belonging to the infants, and which they had inherited from their father.

Held, that the sale was totally inoperative.

Held, further, that the fact of the widow having subsequently to the sale succeeded to the property as heir to the minors did not estop her from alleging that the effect of the sale of her right, title and interest in the property of the infants was *nil*.

Ishan Chunder Mitter vs. *Buksh Ali Soudagur*, Marshall, 614; W. R., Sp., No. 119, cited and distinguished.

GULAR APPEAL from a decree passed by the Subordinate e of Furridpore, decreeing the plaintiff's claim.

e material portions of the judgment of the lower Court are llows :—

story of the case appears to be this: That Anund Mohun Roy, the husband of the defendant, was the owner of a 3 annas 12 gundas share

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Statement.

of a julkur mehal known by the name of Ramkristo Julkaria, bearing No. 504 of the Dacca Collectorate; that the said Anund Mohun Roy borrowed a certain sum of money from Ram Rutton Chuckerbutty; that Kali Kumar Chuckerbutty, son of Ram Rutton, sued Alakmoni, both the obligee and obligor dying in the meantime, in her representative character as widow of the late obligor and mother of her minor sons for the recovery of the loan incurred by the late Anund Mohun with interest and obtained a decree; that in execution of that decree the julkur mehal alluded to was sold and purchased by Kali Kumar; that Kali Kumar, after taking symbolical possession of the mehal, sold a moiety of it to plaintiff No. 2 in the name of her relative Ram Chunder Sen; that about this time a case with reference to a portion of the julkur in dispute was going on between Alakmoni on one side and one Raj Mohun Bose in the other; that in that case Kali Kumar and Ram Chunder appeared and were substituted as plaintiffs in lieu of Alakmoni; that Alakmoni, dissatisfied with the order, appealed to the High Court, but was unsuccessful; and that notwithstanding all that the defendants kept them out of possession. The plaintiff No. 1, as the widow of Kali Kumar, who has since died, and the plaintiff No. 2, as the substantial owner of the purchase made to Ram Chunder, now come to Court to recover possession of the julkur mehal alluded to. The defence in the main is, that the decree, in execution of which the property was sold, was not passed against the minor sons of Anund Mohun or against the defendant as guardian of those minors, but against her personally; and that the rights and interest of the judgment-debtor, the defendant, were only sold in execution; but she having no interest then, the minors having been the true representatives, nothing has passed to the purchaser by the sale. It is worth while to mention here that the minors are now dead, and defendant claims to retain possession of the property as successor to the interest of her deceased sons. .....

Then comes the question on which the case almost hinges: It is this,—to whom did the property belong, and whose rights and interests have been sold in execution of the decree? There is no dispute that the property belonged to Anund Mohun Roy, and that the decree was passed for a loan incurred by him. The question is, whether the suit was laid against Alakmoni as the representative of Anund Mohun or as guardian of the minors, the true representatives, of course, the word guardian was not appended after the name of the defendant, but nevertheless she was styled as mother of the minors. Considering the circumstances of the case, I must hold that the suit was brought for the debt of Anund Mohun and against the true representatives instead of against the defendant personally, and what was sold in execution, was the property itself or the rights and interests of Anund Mohun, however irregularly or ambiguously the defendant or the judgment-debtor might have been described, *vide* Marshall's Law Reports, 614; 17 W. R., pages 459-60; and 24 W. R., page 3.

The decree in execution of which the property of the minors was sold is as follows :—

COURT OF THE MUNSIFF OF BHANGA, DISTRICT DACCA.

Dated 24th December 1859, corresponding with 10th Pous 1266.

No. 636 OF 1859.

Kali Kumar Chuckerbutty, son of Ram Rutton Chuckerbutty, deceased, inhabitant of Chowmukha, Thana Talma ... PLAINTIFF;

versus

Alakmoni Debi, *widow of Anund Mohun Surma Roy*, deceased, mother of Denobundhu and Bepin Chunder Roy, *minors*, inhabitant of Jhenakdia, Thana Talma .. DEFENDANT.

Suit to recover Rs. 75-7-5 pies and the interest thereof under a bond, dated 16th Pous 1261.

This case was heard to-day before Moulvi Abdul Sumud Ahmed, Munsiff of Bhanga, in the presence of the plaintiff's vakeel, Pran Nath Sumarder and Gour Sunder Rahut, and in the absence of the defendant and the oral and documentary evidence produced by the plaintiff's vakeel were taken, and the arguments made by the plaintiff's vakeel, were duly considered: The plaintiff's claim therefore having appeared true, it is

ORDERED:

That the case be decreed, and the defendant pay the plaintiff the amount in claim, the interest on the principal amount for the period the suit was pending, and the costs of Court as per list given below, the decree with the interest thereof from this date to that of the realization thereof.

Evans, for the Appellant. Baboo *Sreenath Doss*, Baboo *Anund Gopal Paulit*, and Baboo *Chunder Madhub Ghose* with him.

Baboo *Kally Mohun Doss*, Baboo *Grija Shunker Mozoomdar*, and Baboo *Boikunt Nath Doss*, for Respondents.

The judgment of the High Court (1) was delivered by

WHITE, J.:—

WHITE, J.

Several questions have been raised by the appellant in this case, but for the purposes of this appeal, it is only necessary to express our opinion on one of them, which is, whether Kali Kumar Chuckerbutty, as the purchaser under a sale in execution of a decree to which I shall presently refer, acquired the interest of Denobundhu Roy and Bepin Roy, the minor sons and heirs of one Anund Mo-

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hun Roy, their deceased father, in the 3 annas 12 gundas share of the julkur mehal, which is the subject of the suit; for if the respondents did not acquire their interest, we think that the present suit must fail, notwithstanding that all the other questions raised by the appellant are determined in favor of the respondents.

The facts which gave rise to the present suit are these: In 1859, Kali Kumar Chuckerbutty, in the Court of the Moonsiff of Bhanga, brought a suit against the appellant, who is the widow of Anund Mohun Roy, upon a bond dated 16th Pous 1261 (1854), and executed by Anund Mohun to Kali Kumar as a security for a loan of Rs. 49 with interest at 12 per cent. per annum, and on the 24th of December 1859, recovered a decree against her for about Rs. 75 and interest and costs. In 1863, the 3 annas 12 gundas share of the julkur was put up for sale, and on the 5th of October in that year purchased by Kali Kumar, the execution-creditor.

The sale certificate has not been produced by the respondents, but the property was admitted by them to have been sold for about Rs. 100. At the time of the sale, the share in the julkur belonged to the two minor sons of Anund Mohun as his heirs, and was in the possession of the appellant on their behalf. Some considerable time after the sale, but before the present suit, the sons died without leaving issue of widows, and the respondent has since their death been in possession as their heirs. It is alleged in the plaint, but not proved, that Kali Kumar obtained formal possession of the share of the julkur through the Civil Court; but, however that may be, it is clear that the respondent has all along been in actual possession of the julkur, and that neither Kali Kumar in his lifetime nor his representatives since his death have taken any steps to procure actual possession by proceedings before the Court which had charge over the execution of the decree. On the 22nd of July 1875, and upwards of 11¾ years after the sale, the respondents, who are the representatives of Kali Kumar, have, for the purpose of recovering such possession, brought the present suit against the appellant, laying its market value at Rs. 7,500.

The decree of the 24th of December 1859 is simply a money-decree, directing "the defendant to pay to the plaintiff the amount

n claim with interest and costs." The amount in claim is found by reference to the recitals to the decree, which state that the "suit was brought to recover Rs. 75-7-5 pie, and the interest thereof under a bond dated the 16th Pous 1261;" and at the head of the decree, where the parties are introduced, the defendant is described as "Alakmoni Debi, widow of Anund Mohun, deceased, mother of Denobundhu and Bepin Chunder Roy, minors, inhabitant of Jhenakdia, Thana Talma." Neither the sale certificate nor the sale proclamation or advertisement has been produced, and the only document connected with the execution proceedings, which has been put in evidence, is a *purwana* from the Moonsiff of Bhanga to the Nazir. This document, which refers to the sale proclamation, is headed with the names of the same parties as appear in the decree, but they are described respectively "decree-holder" and "judgment-debtor." The *purwana* also contains a schedule of the property intended to be sold, in which the interest is described as "the right and possession of the debtor in the 3 annas 12 gundas share of the julkur."

Upon this state of facts, it is contended on behalf of the respondent that the decree of 1859 was really a decree against the appellant as representing her minor sons, and that the interest in the julkur, which was sold in execution of the decree, was in fact that of her infant sons. In support of this contention, several cases have been cited for the respondents, but we need only consider the one which is admitted to be the most favorable to their own, the case of *Ishan Chunder Mitter* vs. *Buksh Ali Soudagur*, Marshall's Reports, 614; W. R., Sp. No. 119. We have had that case discussed in great detail by the respective counsels and vakeels of the parties, but it appears to us that it differs in a most material particular from the case now before us.

In *Ishan Chunder Mitter* vs. *Buksh Ali*, the plaintiff sought to recover certain property which he inherited from his father, but which had been sold during his minority for a debt of his father under a decree obtained against his mother. It cannot be clearly collected from the report of the case in Marshall how the mother was described in that suit, whether as mother and guardian of her minor son, or simply as his mother, nor how the mother was described in the decree, whether simply as defendant or how other-

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Judgment.

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wise. It is clear, however, that the debt upon which the decree proceeded was expressly stated in the decree to be the bond-debt of Juggo Mohun, deceased, who was the father of the minor, and the husband of their mother. That important circumstance appears to us to furnish the solid ground upon which the decision in Marshall rests. This is shown by what the Court says after alluding to the facts of the case: "If the parties who went to the auction had referred to the *decree*, they would have found that the debt for which the sale was to take place was not the widow's but Juggo Mohun's, and that the property to be sold under the decree was not the widow's, but Juggo Mohun's; *because* Juggo Mohun was really the debtor, and the widow was sued merely in her representative character." And again at the close of the judgment the Court says: "Looking, therefore, to the advertisement of sale *which referred to the decree*, we think it is perfectly clear that it was intended to sell the right and interests of Juggo Mohun's representatives." In the case before us no advertisement of sale has been put in evidence, but taking it that the *purwana* correctly represents the interest advertised to be sold as that of the debtor, a reference to the decree would not show to an intending purchaser that the suit was in respect of a bond of the appellant's husband or that he was the real debtor. On the contrary, the description of the debt in the decree being simply that of a bond, and the decree passing against the appellant as "defendant" upon that bond, the reasonable and legitimate inference is that it was the bond of the appellant.

The intending purchaser would not, therefore, from any thing that appears in the body of the decree, be justified in concluding that Anund Mohun, the appellant's husband, was the real debtor, or that the interest in the julkur put up for sale was that of Anund Mohun's infant sons.

It has been argued, however, that, although the bond is not stated on the face of the decree to be that of the appellant's deceased husband, yet that the description of the appellant in the heading of the decree "as the widow of Anund Mohun and the mother of Denobundhu and Bepin, minors," sufficiently showed that the bond debt upon which the decree proceeded was a debt of her deceased husband. We think that it would be too strong an

ice to draw from that description alone that the bond debt e husband's or one for which his minor sons were liable. thority has been cited which supports the respondent's con- in this respect, and it would, in our opinion, be pushing trine contained in *Ishan Chunder* vs. *Buksh Ali*, to an un- table length if we were to decide in accordance with that tion.

is further been argued that Kali Kumar being both the f in the suit and the purchaser at the auction sale, and re fully aware that the debt for which the decree passed lebt of Anund Mohun, and also aware that the appellant the time of the sale no interests in the property except as nting her minor sons, must have intended, when he paid 100, to purchase the rights of the minor sons in this jul- It may be that he so intended and most probably he did so but we cannot base a judgment upon Kali Kumar's inten- however highly probable they may be. We must decide the n before us upon the documents which would properly come notice of a purchaser, who had not Kali Kumar's special of knowledge, and we must have regard to the inferences uch a purchaser might reasonably and legitimately draw he documents. These documents are the decree and the sement of sale, or the recital of the latter in the *purwana*, for the purposes of our decision, we have treated as equiva- the advertisement of sale.

ly, it is contended that inasmuch as since the sale the ap- has inherited the julkur from her sons, the respondents o succeed in this suit. The respondents did not attempt w that the contingent interest which the appellant had in tur in the event of both her sons dying without leaving r widows, was an interest of such a nature as could be at- or sold under a decree, but they sought to establish their y applying to the facts of the present case the well-known e that, when a party sells property of which he is not the but afterwards becomes the owner, he is bound to make e sale out of his subsequently-acquired interest. But that has no application to the present case, where the sale was

1878 [illegible] being made through the Court at the instance of an [illegible].

[illegible] being adverse to the respondents on the main question involved in the suit, it is unnecessary to determine the other points raised on behalf of the appellant. The result is, that this appeal will be allowed with costs, and that the decree of the lower Court will be reversed: appellant will also have her costs in that Court.

[CIVIL APPELLATE JURISDICTION.]

August 26. No. [illegible] of 1878.

RADHA KRISTO BALO AND ANOTHER ... PLAINTIFFS;

AND

RUP CHUNDER NUNDI AND OTHERS ... DEFENDANTS.

Limitation—Contribution—Joint Decree—Act IX of 1871, Sch. II, Art. 100.

Under Art. 100, in Sch. II of Act IX of 1871, when a person has paid more than his own share of a joint decree, limitation runs against a suit for contribution from the time that the excess payment is actually made to the decree-holder.

SPECIAL APPEAL from a decree passed by the Judge of Dacca, affirming that of the Second Sudder Moonsiff of that district. The facts of the case are as follows:—

A person named Peari Kristo Nath brought a suit in the Court of the Subordinate Judge of Dacca, against the parties to the present suit, for possession of certain land; and, on the 21st of August 1870, he obtained a decree for possession, with costs. In execution of this decree for costs, property belonging to the plaintiffs in this suit was attached, and the 5th of March 1873 was fixed for the sale of the attached property. On the 1st of March 1873, the present plaintiffs presented a petition to the Subordinate Judge, stating that certain moneys had been deposited to their account in the Court of the Second Sudder Moonsiff, and praying that the Subordinate Judge would send for so much of those moneys as would be necessary to satisfy Peari Kristo Nath's decree. The Subordinate Judge thereupon sent a rubocari for

he money, and on the next day, the 4th March 1873, the Moonff issued an order for the information of the Subordinate Judge, at, on the latter's sending a receipt, a cheque for the money ould be given. On the 1st of April 1873, the Subordinate udge received the money from the Moonsiff, and on the same ay he paid it over to the decree-holder, Peari Kristo Nath. The resent suit for contribution was instituted on the 17th of March 1876.

The Court of First Instance dismissed the suit as barred by mitation, and this decision was upheld on appeal. The plaintiff then brought this special appeal.

Baboo *Sri Nath Banerjee*, for Appellants.
Baboo *Kashi Kant Sen*, for Respondents.

The judgment of the High Court (1) is as follows :—

Upon the facts found in this case we think that the plaintiffs' laim is not barred by limitation. Under Article 100, Schedule II, t IX of 1871, the plaintiff is entitled to bring his suit within ree years from the date on which the debt due from the defenant under the joint-decree was actually paid by him. In this se the payment was made on the 1st of April 1873, and the resent suit being brought within three years from that date is t barred by limitation.

We, therefore, reverse the decrees of the lower Courts, and mand the case for re-trial to the lower Appellate Court. Costs abide the result.

(1) MITTER and PRINSEP, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

1878 Sept. 11th.

DOYAL MISTREE . . . . . PLAINTIFF;

AND

KUPOOR CHAND AND ANOTHER . . . . . DEFENDANTS.

IN THE MATTER OF THE PETITION OF KUPOOR CHAND.

Small Cause Courts Act (Mofussil) section 21—Ex-parte Decree—Non-appearance of Defendant—Re-hearing—Act X of 1877, sections 98 and 100.

Where the defendant, in a suit brought in a Court of Small Causes, had entered an appearance, but did not appear at the hearing, the suit was decreed *ex-parte*. Thereupon, the defendant applied to the Court to set aside the judgment, showing reasons for his absence. *Held* that under the first part of section 21 of the Mofussil Small Cause Court Act, XI of 1865, the Judge had jurisdiction to entertain the application, and upon sufficient cause for non-appearance being shewn, to grant a re-hearing.

Administrator-General of Bengal vs. *Lala Dyaram Does*, 6 B. L. R., 688, cited.

Mr. M. L. Samiel, for Petitioner.

Moonshee Mahomed Yusoof, for Opposite Party.

THE facts are sufficiently set forth in the following judgment of the High Court (1), which was delivered by

AINSLIE, J. AINSLIE, J.:—

On the 8th March 1878 a decree was made by the Small Cause Court of Patna for Rs. 318-7, in a suit by Doyal Mistree against Kupoor Chand and Luchmun. The decretal order is in the words:—"The case is accordingly decreed *ex-parte* with costs."

An application for a re-hearing was made on the ground that the defendant's pleader had been unable to attend Court at the time the suit was heard. On that the Judge makes an order, in which he states that "the case was not decided *ex-parte* under section 100 of the Civil Procedure Code. The defendant applying for a new trial had put in a vakalutnamah. He only did

(1) AINSLIE and MACLEAN, J.J.

appear when the case was called on for hearing." He then goes on to say that, as the defendant did not pay in the amount of decree with his application for a new trial, he was unable to entertain it. He, therefore, holds that the application does not fall under the first part of section 21 of the Small Cause Court Act, and that as it falls under the second part of that section, and as the applicant has not complied with the conditions required by the Act, he is unable to deal with the case.

The question now before us is, whether in fact the case does not come under the first part of the section, and whether the Small Cause Court, under a misapprehension, has not refused to exercise jurisdiction and determine whether the defendant was prevented by sufficient cause from appearing when the suit was heard. It is unnecessary to notice the discrepancy between the terms of the decree and decision of the Judge on the subsequent application as to the case being *ex-parte* or not. We think that the Judge was in error in holding that this was not a case coming within the description of cases decided *ex-parte*, and that therefore he had no jurisdiction to deal with it under the first part of section 21. That section says: "If it shall be proved to the satisfaction of the Court that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was heard, the Court shall pass an order setting aside the decree, &c." It does not appear from these words that the Legislature intended to limit these provisions to the first occasion on which the defendant might have put in appearance; but it seems to us that, if a case is adjourned from the date fixed in the summons to any later date, and on such later date the defendant is prevented by sufficient cause from appearing, he may make an application under the section. Section 100 of the New Code of Civil Procedure must be read with section 98; and when so read, it appears to be exactly consonant with the provisions of section 21 of the Mofussil Small Cause Court Act.

But the matter is not new. A similar case came before Mr. Justice PAUL on the Original Side of this Court, and is reported in [illegible] L. R., 688. In that case the Counsel appeared, but the defendant was not in Court on the day on which the case was

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called on, and his Counsel had not been instructed and withdrew from the case. The learned Judge held, that the fact that the defendant had answered to the summons and had engaged Counsel did not deprive him of the right to make an application to the Court under section 119 of Act VIII of 1859 to set aside the judgment passed as an *ex-parte* judgment.

We must, therefore, set aside the order of the Judge of the Small Cause Court, and direct him to exercise the jurisdiction vested in him by the first part of section 21 of the Small Cause Court Act, and determine whether the defendant has shown sufficient cause for his non-appearance at the time when the suit was heard.

The petitioner is entitled to his costs.

[CIVIL APPELLATE JURISDICTION.]

Sept. 14th.

No. 138 of 1877.

CHARLOTTE REBECCA FOWLE . . . . PLAINTIFF;

AND

EDWARD FOWLE . . . . . DEFENDANT.

Divorce—Act IV *of* 1869—*Desertion—Abandonment—Wife, Separation against wish of—Alimony—Costs of Appeal.*

Where there has been a voluntary separation between husband and wife, there can be no desertion of the wife by the husband, unless there shall have been a resumption of intercourse, or, the wife shall have taken active steps to make the renewal of such intercourse possible or practicable.

Wood vs. *Wood*, 1 C. L. Rep., 552, distinguished.

In a suit for divorce, a wife, though unsuccessful, is entitled to the costs of an appeal if it be not unreasonably preferred.

Jones vs. *Jones*, L. R., 2 P. and D., 333, followed.

REGULAR APPEAL from a decree passed by the Recorder of Rangoon.

This was a suit for divorce, on the grounds of cruelty, adultery and desertion. The respondent, Mr. Edward Fowle, who was born in June 1820, arrived in Moulmein from England in the year 1845. He afterwards carried on business there as a timber merchant, until 1856, when he returned to England. While in

Burmah he had formed a connection (Burmese fashion) with a woman named Mahkin, and on leaving he arranged with Mahkin that, if he did not return within twelve months, she was to be at perfect liberty, and he also.

Shortly after his return home he met, for the first time, the respondent—then Miss Charlotte Rebecca Webster—to whom he was married on the 26th of November 1856. At the time of the marriage, the petitioner's father settled £1,000 and respondent £500, to the separate use of the petitioner. This sum produced an income of £80 a year which, from the time of her marriage, the petitioner has always received and applied to her own use. In September 1857, a child was born, and Mr. Fowle's business in Burmah having become involved through the negligence and dishonesty of the agent whom he had left in charge, the petitioner and the respondent not having sufficient means to live in England, left England for Rangoon, where they arrived in May 1859. They remained in Rangoon till April 1861, when Mrs. Fowle returned to England. When Mrs. Fowle left Rangoon, there was no intention on either her part or on that of the respondent not to resume cohabitation again.

Some months after the petitioner's return to England, Mr. Fowle went on business to Moulmein, and, meeting Mahkin there, resumed his former connection with her. This connection continued without interruption down to the institution of this suit, during which time Mahkin had several children which the respondent brought up, educated, and acknowledged as his. During all this time Mrs. Fowle remained in England with her daughter, keeping up a correspondence with the respondent.

From this correspondence it appears that the petitioner and respondent did not live happily together while in Rangoon, she complaining of her husband's bad prospects, his neglect, harshness, coldness and want of steadiness, and he of her stubborn and irritable temper, unfounded jealousy, and general want of appreciation of her husband. Up to 1868, she received a fair allowance, having regard to her husband's income which was small. From 1869, his prospects rapidly improved, and his average income for the three or four years preceding the suit

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was Rs 46,000. During this time he only allowed his wife and daughter £150 a year, which with her separate income, made £250. Mrs. Fowle constantly complained of the smallness of her allowance, and it appeared from her evidence that had she had a fair allowance, she would not have desired to join Mr. Fowle in Rangoon.

Up to 1871 Mrs. Fowle was unaware of the connection which her husband had formed with Mahkin, but she states in her evidence that from her knowledge of his character and opinions, she had had an idea that he would not remain faithful to her. In that year, Captain Brooking, a mutual friend of Mr. and Mrs. Fowle's, left Rangoon for England. Shortly before his departure Mr. Fowle said to him—"Tell Charlotte not to come out." He delivered this message to Mrs. Fowle, and, on her inquiring how Mr. Fowle was living, he said—"Don't ask me. I know nothing about how he was living, but I have only heard there was a woman of the name of Mahkin about the place." Mrs. Fowle afterwards inquired of several persons as to her husband's conduct, who told her that he was living a quiet, steady life. She heard nothing further of Mahkin until the 25th of December 1875, when the whole matter was told her by a Mr. Hannay. She immediately made preparations for leaving England for Rangoon, which she did on the 20th of January 1876. On the 16th of March 1876, the present suit was instituted in the Court of the Recorder of Rangoon.

An application was made by the petitioner for alimony *pendente lite*, and the Court granted Rs. 700 per month. The case having come on for hearing, his Honor, the Recorder, found the charges of cruelty and desertion unproved, but he gave a decree for a judicial separation on the ground of the adultery with Mahkin. It should also be noticed that this was the only charge of adultery which was substantiated against Mr. Fowle and this was admitted by him.

When the case came on for final disposal, the respondent was ordered to enter into a bond with the Registrar of the Court conditioned for the payment of Rs. 700 a month as permanent alimony. The respondent moved for a review of judgment, when this amount was reduced to Rs. 620, on the ground that in

fixing the amount at Rs. 700, the Court had not taken into consideration the fact of Mrs. Fowle having a separate income of £80 a year. The petitioner appealed on the whole case to the High Court of Judicature at Calcutta, but when the appeal came on for hearing she abandoned the charge of cruelty, the questions which remained for the Appellate Court to decide were the fact of desertion, and the amount of alimony.

Evans, for the Appellant, *Mr. Remfry* with him.

Evans.—The real issue is: Is the petitioner entitled to a divorce, and this depends on whether desertion and adultery for two years has been proved. The adultery is admitted, and the only question is as to the desertion. As to that, it appears uncontradicted, that during Mrs. Fowle's residence in England after her arrival there in 1861, she received letters from her husband warning her not to come out to him, as he would leave the country if he heard she were coming. He sent a message to her by Captain Brooking in 1871, that she was not to come out; he repeated again and again that he would never leave Burmah, would never live in England; and during all this time he was living as the husband of Mahkin, whose children he educated and acknowledged as his own—there could be no stronger proof of desertion than that. Besides, he tells her that he will make no change in his habits or opinions which were the prime cause of all the unhappiness of their married life.

The husband's prohibition to follow him is strong evidence of desertion—*Macqueen on Divorce, pp.* 300-3; and his refusal to make any change in his habits of life is also strong evidence to the same effect—*Gibson* vs. *Gibson*, 29 Law Jour., 25; *Meara* vs. *Meara*, 35 Law Jour., 33. It is not a fact that there cannot be desertion unless the wife deplores the separation—*Macqueen on Divorce*, p. 306. *Gatehouse* vs. *Gatehouse*, L. R., 1 P. & M., 331, shows that desertion dates from the time the husband meant to abandon his wife; in this case we say the desertion commenced when the respondent formed the permanent connection with Mahkin in 1861, and was complete in two years afterwards. See as to constructive desertion, *Williams* vs. *Williams*, 3 Sw. and Tr., 547; *Lawrence* vs. *Lawrence*, 2 Sw. and Tr., 580; and *Wood*

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vs. *Wood*, 1 C. L. R., 552; the last is a strong authority in my favour.

Once the desertion is complete, the right to divorce cannot be lost unless the wife condones the adultery—*Macqueen on Divorce*, 307; *Cargin* vs. *Cargin*, 27 Law Jour., 69; *Cudlip* vs. *Cudlip*, 27 Law Jour., 69. And the fact of giving an allowance to a woman whom he has abandoned is no answer to a suit for divorce —*Macdonald* vs. *Macdonald*, 4 Sw. and Tr., 242; *Yateman* vs. *Yateman*, L. R., 1 P. and M., 489.

On the question of alimony, we contend that the amount allowed was too small. In *Orde* vs. *Orde*, 5 B. L. R., Appendix, 34, one-fourth was given. The review cutting down the amount of alimony was wrong—*Otway* vs. *Otway*, 3 Phill., 109. The rule is to give as much or more permanently than was given *pendente lite*. Again the alimony should be charged on the immoveable property of the defendant; his own bond is not security within the meaning of section 37 of the Divorce Act of 1869. See for form of Bond, *Macqueen on Divorce*, p. 428, *Appendix*.

J. D. Bell and *Jackson*, for the Respondent.

In order to constitute desertion there must be abandonment of the wife, against the wish of the wife, and there must be positive proof that it is against the wish of the wife. Macqueen's conclusions to the contrary (page 306) are bad law. What he calls "*dicta*" are clearly good law. It must be proved affirmatively that the wife has objected to the separation—*Smith* vs. *Smith*, 1 Sw. and Tr., 359; in no case will a divorce be granted unless the Court can put its hand upon some circumstances and say:—"This shows the separation is against the wish of the wife—*Gibson* vs. *Gibson*, 29 Law Jour., 25; *Thompson* vs. *Thompson*, 27 Law Jour., 65; *Yateman* vs. *Yateman*, L. R., 1 P. and M., 490; *Lawrence* vs. *Lawrence*, 2 Sw. and Tr., 583. Now in the present case, the parties separated voluntarily in 1861, and in the whole correspondence there is no trace of a desire on the part of the wife to resume cohabitation. All her letters show that she had no wish to return to her husband so long as she got a sufficient allowance.

Fitzgerald vs. *Fitzgerald*, L. R., 1 P. and D., 694, is applicable

ere. Here, as there, the cohabitation was voluntarily determined in 1861, and that case shows that there can be no desertion under such circumstances unless there is a resumption of cohabitation. Where the wife chooses and agrees to remain apart there can be no desertion—*Buckmaster* vs. *Buckmaster*, L. R., 1 P. and D., 713. *Gatehouse* vs. *Gatehouse*, L. R., 1 P. and M., 332, is not in point. There the intercourse was merely suspended; here it was voluntarily determined. *Wood* vs. *Wood*, 1 C. L. R., 552, is also a case of mere suspension; it is a case of a different class from *Fitzgerald* vs. *Fitzgerald*, L. R., 1 P. and D., 694, and quite consistent with it. When all the letters of the respondent are read together, they show that he never had any intention to abandon his wife.

The Court below is right on the question of alimony. The personal bond of the husband is amply sufficient security—*Hyde* vs. *Hyde*, 4 Sw. and Tr., 80. [Counsel were stopped on this point.]

Evans, in reply.

Smith vs. *Smith* is a case from which you cannot draw a principle that will be supported by the other cases. In *Gatehouse* vs. *Gatehouse* it was held that the desertion was the act of the husband, inasmuch as it appeared quite clear that the wife had no intention of severing the connection, that is also the case here. The absence of any expressed demand on the part of Mrs. Fowle, for the resumption of cohabitation, is accounted for by the fact that it was only in 1875, shortly before she came to Rangoon, when she heard of Mahkin, that she was satisfied of Mr. Fowle's intention to abandon her. There is quite sufficient evidence to show that when Mrs. Fowle heard of the whole circumstances, the separation was against her wish. This is a clear case of a woman being abandoned without her knowing it, and I do not see on what ground it can be contended that a wife cannot be abandoned without knowing it.

The following judgments were delivered by the High Court (1):—

JACKSON, *Offg. C.J.*:— JACKSON, C.J.

This was a petition for dissolution of marriage by a wife,

(1) JACKSON, *Offg. C.J.*, MARKBY and PRINSEP, *J.J.*

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Charlotte Rebecca Fowle, on the ground of adultery, cruelty, and desertion, filed under the Indian Divorce Act, in the Court of the Recorder at Rangoon, in British Burmah. The husband, Edward Fowle, as respondent, admitted the principal act of adultery or rather course of adulterous life charged; but denied the other adulteries, and also the cruelty and the desertion. He avowed, however, that the petitioner had connived at the adultery which he admitted. The suit having come on for trial, the Recorder found that cruelty had not been committed; that the petitioner had not been deserted; and that the adulteries charged, previous to an adulterous connection with a Burmese woman named Mahkin, had not been proved; but on the ground of the last-mentioned adultery, which had not been condoned, and as to which he found no connivance or acquiescence, he decreed a judicial separation with alimony, but dismissed the petition for a divorce. The alimony was, at first, fixed at Rs. 700 per mensem, but, on reconsideration, he thought fit to reduce that sum by Rs. 80 per mensem, as the equivalent of an income arising out of the marriage settlement of Mrs. Fowle; so that the sum finally allowed as alimony was Rs. 620 per mensem, secured by a penal bond which the husband was required to enter into with the Registrar of the Court in the sum of Rs. 10,000.

Charlotte Fowle, dissatisfied with this judgment, appealed on the ground: *first*, that cruelty had been sufficiently proved; *secondly*, that desertion had been proved, either of which, coupled with the adultery, entitled her to a dissolution of the marriage; *thirdly*, that the alimony allowed was insufficient; and, *fourthly*, that it had not been adequately secured or made payable as long as the petitioner lived. The respondent, on the other hand, preferred an objection, not in the sequel insisted on, that the alimony was *excessive*. The appellant, at the hearing, abandoned the charge of cruelty; but we are much pressed to find a case of desertion.

The facts admitted are these:—Edward Fowle, the respondent, apparently born about 1820, came in early life, to Moulmein. His father, a Captain in Her Majesty's 63rd Foot, dying in 1 shortly after, left a widow and two daughters in very

ircumstances. Edward Fowle continued in Burmah in various ercantile situations, helping his mother out of his income. In e course of time, he formed a connection, of a kind very com- on in Burmah, with a woman of that country named Mahkin. aving, apparently, amassed a little money, and having a certain mmercial position, he went to England in 1856; things being arranged between him and Mahkin, that both should be free he had not returned within a year. Edward Fowle, having terwards gone to France, met, at Calais, the petitioner, whose rents had known him as a boy, being friends of his father.

In November 1856, Edward Fowle married the petitioner, and, out a year afterwards, a daughter—the sole issue of this mar- age—was born. It seems that Mr. Fowle's fortune, though osperous enough when he left Burmah, was precarious. He s reduced to serious difficulties by the misconduct of an agent, d the couple soon found themselves in embarrassment. About is time, too, subjects of dispute appear to have arisen between sband and wife; she manifesting a somewhat positive temper, d he being, in her opinion, profuse, and certainly thoughtless d provoking in his manner and conversation. Those letters of rs. Fowle which are preserved, (relative to this period of their arried life), show a good deal of affection on her part, coupled, wever, with a very distinct appreciation of her own rights and the duties of her husband. One result of their pecuniary oubles was, that Mrs. Fowle went over to Calais, where her rents were, for her confinement. Immediately after she had me, he obtained a temporary appointment, being attached to e Siamese Embassy then in England. In this capacity, he took his abode at Claridge's Hotel, where Mrs. Fowle presently ined him. They did not live very happily then, and out of some sidents of that time arose charges to which I need not at pre- nt advert. There were quarrels about a Burmese servant, and alousies brought about a good deal by Mr. Fowle's jocular ides of expressing himself.

At last, in the early part of 1859, his funds having apparently e to an end, Edward Fowle returned to Rangoon accompanied is wife, the infant being left behind in the care of the wife's ther, Mrs. Webster. Mrs. Fowle says, that he proposed her

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remaining in England, but that ways and means for her maintenance there were not forthcoming. The husband's affairs did not at first improve; their life at Rangoon was not entirely happy, nor, according to Mrs. Fowle, even comfortable. After a time, insolvency appeared imminent; and it was arranged that Mrs. Fowle should return to England; and she accordingly left Rangoon in April 1861, and arrived in England about the latter end of June.

From that time their conjugal life has never been resumed; and, indeed, they never met again till Mrs. Fowle returned in 1876, to Rangoon, for the purpose of taking the present proceedings. But a remarkable and not very regular correspondence was kept up. To some of the letters on both sides it will be necessary to advert by-and-bye. For the moment, it need only be said that on the side of the husband, they contain alternate assurances of ardent love and violent reproaches, interspersed with trivial and often indelicate gossip and remarks. On the side of the wife, whose preserved letters are much less numerous, there is little show of love but a friendly disposition with a tendency to lecturing, a good deal of pressure (reasonable enough it must be said) for an increased allowance, and occasionally a tone decided and even threatening on this subject. Mrs. Fowle's life during all that time is admitted to have been quite irreproachable. She had her child with her, and brought her up till she was nearly adult, when the girl went to her father's relations.

But a few months after his wife's return to Europe, Mr. Fowle went on business to Moulmein, where he met with Mahkin, the Burmese woman previously mentioned; and the result was, that he resumed cohabitation with her, and continued to live openly with her down to the time of the trial. By this woman, he has had, in the *interim*, several children whom he has had baptised as his, who bear his name and have been educated at his expense, and indeed, has also been a daughter of Mahkin by another European with whom she had had an intermediate connection. He says indeed, and emphatically affirms, that, if Mrs. Fowle had returned during this period, Mahkin would have immediately left him; and that it was so understood between him and Mahkin. But an admission of the kind was elicited from Mahkin herself, who

witness in the cause, and the tenor of her evidence makes this atement somewhat improbable; for she says, that she at first was ıgry and repelled his advances when they met at Moulmein, and is anger can only be ascribed to resentment at his having given ır up for his European wife; and, further, it appears that she turned to him out of compassion for his reduced circumstances, ıd made him considerable advances out of her own funds. In is state of things, it is unlikely that she would have consented be taken up and put down at Mr. Fowle's convenience.

There is consequently here a case of the clearest and most sys-matic adultery, which is more than a mere act of adultery, for amounts in fact to a putting by the respondent, of Mahkin for any years together, as completely as possible, into the place of is wife. She managed his house, she bought and sold for him, nd was, as the witness Antram says, the "lady of the house." he bore him children, she left her money in his hands and helped him generally in his business in every thing;" and this ithout any disguise whatever. Mr. Fowle says, indeed, that he ıd quarrels with her; but he had also quarrels, at least as bitter, ith his wife, and perhaps these differences may be taken as aking the position more completely quasi-conjugal.

Upon this arises at once the question, whether there was any quiescence or connivance on Mrs. Fowle's part, when she be-ame aware of the state of the case; and what her conduct was hen it came to her knowledge. This question may be answered t once. It seems that Mrs. Fowle had few friends, perhaps not ne intimate friend, in Burmah; and that she kept up no corre-pondence with any one in Rangoon. She was quite aware of her sband's character, and thought him at least as bad as he actually as. He had led her not to expect marital faithfulness in him, d she undoubtedly did not expect it. She says that she always ked upon the resumption of their conjugal life as probable; d that she had made up her mind not to ask questions, and ss infidelity on his part was actually brought to her notice, to me that his conduct had been correct. Now, the only thing h tends to affect her with knowledge, prior to 1875, of her band's intercourse with Mahkin, is the fact that, in 1871, Cap-Brooking, an acquaintance, came from Rangoon, bringing a

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message from the husband; and in answer to a question from Mrs. Fowle said, "he had heard there was a woman of the name of Mahkin about the place." It appears to us, that this vague statement of Captain Brooking would not necessarily convey to her mind an absolute knowledge that her husband was at that time actually living in adultery with Mahkin; still less can the statement be taken as foundation for a charge of connivance. On the other hand, it is certain, that as soon as Mrs. Fowle obtained a positive knowledge of the state of things in the winter of 1875, she took immediate measures for going out to Burmah with the view of taking proceedings for her divorce, if it could be obtained.

There can be no question, therefore, as to the respondent having committed adultery at which the petitioner has not connived. As to the earlier adulteries in Rangoon, we quite agree with the Court below in thinking that they are not proved; and, as to those charged as having been committed in England, we think it unnecessary to go into them: *first*, because if proved, they would not advance the petitioner's case as to a judicial separation; and, *secondly*, because to give the Courts in this country jurisdiction to dissolve a marriage solemnized out of India, the adultery complained of must have occurred in India. But the evidence as to such acts was certainly unsatisfactory.

We now come to the far more difficult question, whether the petitioner has further made out the charge of desertion which, if proved, would, coupled with the adultery, entitle her to a dissolution of the marriage. This is obviously a mixed question of law and of fact, and it will be convenient first to state, with all practicable brevity, how the facts appear to stand.

It is pretty clear, that, when husband and wife parted in 1861, the idea of a permanent separation was not in the mind of either. Mr. Fowle seems to be a person of buoyant character and impulsive temperament. His impressions are transient and his moods are changeable. He seems a kind-hearted man without much fixity of principle; and his correspondence plainly shows, that he was equally ready to be very fond of his wife or to be at daggers drawn with her, according to the tone in which the lady chanced to respond to his advances. She, on the other hand, unmistakably displays greater tenacity and firmness. The affections

ading, even if accompanied with a certain hardness, exempli-
l in the earlier letters of her opening married life, has wholly
appeared in the after letters. She would probably say that she
disillusionnee. The mingled coarseness and levity with which
had been treated effectually dispelled all romance or fond-
s from her nature, and left her cold and relatively to him con-
trated in character.

He had an attachment to her chiefly sensual in its nature, and
ped vaguely that something would "turn up" which would
ng them together again. She, fond of the pleasanter parts of
, and indifferent now to her husband, had probably no wish to
main in Burmah; but would have returned thither, if she had
ught her position there likely to present greater attractions
n her life in England. As time wore on, it may be that
onger inducements would have been required to tempt her to
urn; but we find no trace at any time of a settled resolution
to do so. He, on the other hand, had constantly affirmed
t he would never go back to England; and had announced
intention of removing or concealing himself in case his
e should come in search of him. In his cross-examination
says, on the contrary, that if his wife had come out, as
entered at one door, Mahkin would have gone out at the other.
t it is impossible to lay much stress on the declarations of
man like Fowle, who seems to have been in turns cajoling
defying his wife; now trying to soften her with the
ount of his misery, and then taunting and wounding her
his language. He had, indeed, taken a step which, un-
own to her, greatly altered their relation; and which, on the
hand, indisposed him to leave Burmah; and on the other,
de him use measures to deter her from coming out. But a
rrel with Mahkin, a failure of his health, or the possession of
red riches, might, at any time, have led to a change in his
tion and to his going to England; and we cannot doubt
if he had so gone in any of the years between 1863 and
, he would have gone at once to his wife, and ostensibly
ble relations would have been resumed.

at which did happen was brought about by this,—that the
estranged by long absence, embittered by being kept in

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narrow circumstances when she knew her husband to be living in abundance, was roused to action by the certainty that she had been not only neglected but displaced.

Now, what in the legal sense is "desertion" which the petitioner alleges and which the exigencies of her case require her to prove? Desertion, by the Indian Divorce Act, "implies an abandonment against the wish of the person charging it." Abandonment is not defined; but the effect of the clause is doubtless to introduce into the Indian Statute the view adopted by the Courts in England in construing the English Act. Now, the expression "against the wish" is capable of two meanings. It may be construed either as contrary to an actively expressed wish of the person charging, and notwithstanding the resistance or opposition of such person; or it may mean simply an act done when the wish of the person affected by it is the other way. All the English cases seem to put the stronger and more definite construction upon the words, and as the Indian Legislature has undoubtedly adopted the language of those decisions, we ought probably to interpret them in the same way.

Indeed, regard being had not merely to the high authority of the Probate and Divorce Court on other grounds, but also to the fact that it is a tribunal much occupied in considering cases of the kind, we think that its decisions must usually and necessarily be a guide to the Courts in India, except when the facts of any particular case arising out of the peculiar circumstances of Anglo-Indian life constitute a situation such as the English Court is not likely to have had in view. Therefore, however hardly the construction there adopted may appear to bear upon the wife in certain cases, we should be compelled to follow it here, unless peculiarities of the kind adverted to should appear to take a given case out of the ordinary rule, or unless the case can be shown to be clearly outside of the rule.

Even the case of *Fitzgerald* vs. *Fitzgerald*, L. R., 1 P. and D., 644, harsh as it may seem to be, has been recognised as an authority by this Court; and the petitioner in the case of *Wood* vs. *Wood*, 1 C. L. R., 532, only succeeded (on appeal) by showing that there were circumstances in her case which made the ruling inapplicable. It is unnecessary to discuss the expl

iven by Mr. Jackson of *Fitzgerald's* case, viz., that where
ɔurse had been only suspended, the omission by a husband
il himself of the opportunities of renewal might constitute
.on, but that where intercourse had been determined there
ıave been a resumption before desertion could take place,
l, because we do not think there had been a real determina-
f intercourse, (considering what the situation of the parties
as also for other reasons which will appear.

.he case before us, if there was any desertion, if the wife
ɔandoned, she certainly was not a consenting party, but it
be less easy to say that she made any active opposition.
as she in truth abandoned? If so, when and how? It
r that the facts relied on to prove desertion must be some-
beyond mere adultery; for, in order to obtain a divorce,
ɔ, if she cannot prove cruelty, must prove desertion in
ɔn to adultery, and this certainly cannot mean adultery
dultery.

v, Mr. and Mrs. Fowle had lived separately by mutual
ıt for many years; and we do not find, although she might
ɔeen willing to resume cohabitation, that she ever actively
; it. The separation, indeed, cannot be said to have taken
in a hostile way, on account, either of conjugal misbehavi-
ı his part, or even of any estrangement between them,
gh such estrangement had certainly begun on one side,
on both. They separated purely for reasons of convenience,
uring the whole time of her absence, the only complaint
Mrs. Fowle ever made was tending the exiguity of her
nce, and that not until she had reason to believe that her
ıd could well afford to make it larger; and when she did
England, on hearing news which made her think differently
position, it was not with the intention of demanding a
al of conjugal relations, but with the view of commencing
proceedings.

entirely concur in the decision of this Court in the case
od vs. *Wood*, 1. C. L. R., 552, and that case shows that
may be desertion supervening on a temporary separation,
gh such separation had the wife's acquiescence, and
gh there had been no resumption of the common life and

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home. But that was when the wife, after continuing to live with the husband for years notwithstanding his gross misconduct, had done everything in her power to "prevent an entire separation and to make it practicable for them to live together again." Certainly Mrs. Fowle had shown no such toleration and had made no such endeavours. But then, it was suggested in the course of the argument that Mr. Fowle's conduct with Mahkin had amounted to nothing less than installing her in the place of his wife, and consequently an abandonment of the wife; and it was pointed out, that it would be dealing hard measure to the wife, to make it a condition of giving her the relief which she seeks, that she should first have demanded the resumption of those conjugal relations which the husband's conduct must have made odious, if not impossible, to her. But, even if the conduct in question amounted to desertion, she would be bound, according to the cases, to give evidence of conduct on her part showing unmistakeably that such desertion was against her will.

But was it a desertion? The connection with Mahkin, however immoral, was of a kind extremely common in British Burmah. Mrs. Fowle's family knew, and we cannot doubt that she also knew, her husband to have had a *liaison* of the kind before she married. She knew what his notions were even after marriage, and she certainly believed him to act fully up to them. Her language on several occasions, and particularly near the close of her cross-examination,* shows plainly that she was prepared to hear that he had been unfaithful to her, and indeed thought it probable. Now, she not only knew her husband's history and ideas, but having lived for nearly two years in Rangoon, she had presumably learnt something of the ways of Englishmen there; and, consequently, the form which Mr. Fowle's infidelity took is precisely that which she would have had reason to expect.

* "From the conversations I "had had with Mr. Fowle as to "his opinions on the subject, I "had always my suspicions that "he was unfaithful and was not "likely to be true to me during "our separation. *I certainly "had an idea that he would not "remain faithful.*"

Then, was this desertion? During a course of years, the wife lives apart, quite contented, except as to the amount of her income, and making no attempt, manifesting no wish to resume closer

intercourse. During nearly all that time, unknown to the wife, at least as far as exact information goes, the husband has allowed another woman to enjoy most of the advantages of the wife's position.

When did the desertion take place? It is difficult to conceive a desertion of which the person deserted is unconscious. It must then have commenced when she became aware of it, and, if so, it then became incumbent on her to show that she was deserted against her wish; in other words, to have taken some steps towards the renewal of that intercourse which had been so long suspended. Instead of that, she appears to have thought only of surprising her husband in *flagrante delicto*, for the purpose of obtaining dissolution of the marriage.

Indeed, other arguments against her may be derived from the correspondence which is on record; for instance, in more than one or two of his letters Mr. Fowle throws out the plainest hints of a disposition to help her to obtain a divorce. Take, for instance, the letter marked D. 18, which is undated, but which from internal evidence was written some time after March 1868, about seven years after their separation. He uses these words: "Knowing this, and moreover feeling for you, I shall throw no obstacle in the way of your getting a divorce, if you want it and if I find that you meet me in a friendly spirit. I can assist you towards it without collusion, but openly and effectively." The immediate answer to this letter is not before us; but in April 1872 she refers to it in these terms: "I am perfectly willing to meet you in a friendly spirit, and to consider again your letter of about three years ago and which you may remember." She adds referring to a message delivered to her by Captain Brooking, that she has "not the slightest desire to see Rangoon again," but that she "will do anything and brave anything, however distasteful, to set her daughter and herself in a recognized and suitable position."

Is this the language of a woman deserted against her wish? We think not. On the contrary, she seems to put aside the occasion afforded to her of expressing a wish to return to the common life and home; for, according to her account, she had then no knowledge of anything which should have disinclined her

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or made it difficult for her to return. Mr. Bell, indeed, would go further, and suggest that the proposition for a divorce came from her; but of this we have seen no proof, nor does it seem probable. We think that in truth there was no desertion at any time. Mr. Fowle swears that if, during the cohabitation with Mahkin, his wife had made her appearance, Makhin would at once have disappeared; and, in expressing, at an earlier place in this judgment, a doubt whether it would have really been so, it was not our meaning that such an occurrence was in itself improbable. On the contrary, it seems in accordance with the nature of such connections. What we doubted was, that Mr. Fowle would have consented to sacrifice a woman who was useful to him and to whom he had become used, in favour of another who had never made him happy, and to whom years of separation had made him indifferent. The facts, therefore, which are relied upon as desertion, seem to us to amount only to a prolonged and systematic adultery. We are consequently of the same opinion as the Court below on this part of the case.

The next point raised, was the amount of alimony which, on Mrs. Fowle's part, was said to be inadequate. This contention, however, has not been made out to our satisfaction. By the decree which she has obtained, Mrs. Fowle is placed in a situation far better in a pecuniary point of view than she had ever enjoyed before; indeed, sufficiently good to enable her to save something. She has no child to support, and no particular expense to provide for beyond those of ordinary subsistence. Upon our intimating this opinion, the respondent's Counsel abstained from pressing his objection that the alimony was excessive in Mr. Fowle's present circumstances.

The last point urged was as to the form of the decree, which, it was contended, ought to have provided a more effectual and durable guarantee for the wife's receipt of the income allotted to her. But we are clearly of opinion, on the authority of the decision in *Hyde* vs. *Hyde*, 4 Sw. and Tr., 80, and on the reason of the thing, that the Court, even if it had the power, ought not to tie up the property of the husband, who is a mercantile man and requires the unfettered use of his capital, or convert alimony into an absolute interest in and charge upon his estate.

Being, therefore, in accord, in all points of decision, with the learned Recorder, whose judgment is an example of careful and complete analysis of evidence, we dismiss the petitioner's appeal and affirm the decree of the Court below.

MARKBY, J.:—

I have very few words to add to the judgment of the Chief Justice, in the conclusions of which I entirely concur.

As regards the desertion the fundamental consideration in this case is, that the parties had by mutual agreement determined to separate and to live, the one in England and the other in Rangoon.

The separation was not originally an unqualified one; and, though there was never any definite prospect of re-union, I do not think that either party entirely abandoned the notion that the separation might one day be put an end to. Under such circumstances, it would be difficult—but it would not, in my opinion, be impossible—to prove desertion. The situation of the parties, though it approaches, is not identical with the situation of a husband and wife who are formally separated under articles of separation. But the appellant must establish clearly, that this separation by consent became at a subsequent time a desertion by the husband. To do this, she must be able to point to some distinct and definite act of the husband indicative of the intention to desert. No such act has, in my opinion, been proved. The appellant's Counsel laboured to show that Mr. Fowle had, by the connection he formed with Mahkin, placed an insuperable barrier to the resumption of conjugal life with the appellant. I do not myself think that the evidence entitles us to say, that this barrier was an insuperable one. But that is really not the question. The question is, whether Mr. Fowle, by his connection with Mahkin, intended to commit an act of desertion towards his wife. I think he did not. The connection with Mahkin had assumed a character which it could never have assumed had Mr. and Mrs. Fowle not been living apart; but for this separation both parties are responsible and not Mr. Fowle alone. It is to this separation, and not to any change of intention on the part of Mr. Fowle in regard to his wife, that I

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attribute the position which Mahkin obtained in Mr. Fowle's household.

The appellant's Counsel also relied on the letter written by Mr. Fowle to Mrs. Fowle's mother-in-law in August 1862, as showing an express and final intention on his part to abandon his wife. It is highly improbable that if Mr. Fowle had formed any such intention he would have announced it in this manner. But we must read this letter with the letter written the very next day to his wife; and it is clear then, that in the first letter Mr. Fowle was repelling somewhat vehemently any blame which might be cast upon him by his mother-in-law for the unhappiness of her daughter's marriage, and that he was not announcing a final determination to abandon his wife. It seems to me, therefore, that the appellant has failed to prove desertion; and I concur in dismissing the appeal.

PRINSEP, J. PRINSEP, *J.* :—

I concur in the judgment which has just been delivered by the Chief Justice.

J. D. Bell.—Under the order of this Court we were compelled to deposit Rs. 1,100 to cover the cost of printing, and a sum of Rs. 1,000 to answer the further costs of the appellant of and incidental to this appeal. That Rs. 1,000 is still in Court, and I would ask your Lordships for an order that it be returned to us.

Evans.—The principle of the English decisions will govern here, and the wife is entitled to her costs even though she be unsuccessful.

JACKSON, C.J. JACKSON, *offg. C.J* :—

Yes, in the Court below.

Evans.—In *Jones* vs. *Jones*, L. R., 2. P. & D., 331, it is shown that the same rule holds on appeal. *Brown* vs. *Ackroyd*, (cited in Macqueen, p. 619) shows the foundation of the rule to be that a wife may bind her husband for necessaries, and a suit brought with reasonable and probable cause will be considered necessary. In this case there can be no doubt that the wife was justified in bringing the suit. The proper way would be to order the attorney's costs to be taxed and paid by the respondent.

Bell.—With regard to the scale on which costs would be given, he general rule of the Appellate Court must be followed, *i.e.*, the aluation of the suit is to be taken as the basis of costs.

ACKSON, *offg. C.J.* :—

In regard to the costs of the cause, we find that this is an ppeal which was not unreasonably preferred. There were, ndoubtedly, points of difficulty in it; and although it is true at the question of cruelty was pressed on one side, we must n the other hand, bear in mind the aggravated and unexpected urn given to the case in the Court below by the charge of misconduct suddenly brought against Mrs. Fowle. We think, therefore, in accordance with the practice which is laid down in *Jones* v. *Jones*, L. R., 2 P. and D., 333, that the wife should have the easonable costs of her appeal. She has already had allowed, re find by the order of this Court made in February last, the um of Rs. 1,114 to pay for the costs of translation and inting. This was not a case in which a money value could be adily fixed; and we think that, on the whole, the sum of s. 1,600 will be a fair and sufficient sum for what would ordinarily called vakeels' fees. Of this sum, Rs. 1,000 has already n paid. The balance Rs. 600 will be debited to the sum ich may remain over, from the Rs. 1,114 in deposit, after ucting the actual costs of printing, &c. If that amount is not ficient, the respondent will have to pay the excess.

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ROMA PROSUNNO SINGHEE v. BOYKANTO NATH GHOSAL.

Judgment.

JACKSON, J.

The following judgment of the High Court (1) was delivered by

JACKSON, *J.*:—

We think the Judge was wrong in this case. There was no ground for saying that the 8-anna share of the talook "was burdened with the lien existing previously on account of the costs of the appeal aforesaid," or even that the decree-holder Roma Prosunno Singhee was liable to contribute to the payment of the amount of the decree which was a decree for costs against the respondents. The persons originally liable under the decree are the persons liable to pay the costs. The fact that one of the decree-holders has since purchased a share of the talook does not alter their position.

The judgment of the lower Court is set aside with costs.

(1) JACKSON and MCDONELL, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

Dec. 19th.

No. 208 of 1878.

UNDER KANT MOOKERJEE . . . . . } OPPOSITE PARTY, APPELLANT;

AND

M COOMAR COONDOO AND ANOTHER . . . . . } PETITIONERS, RESPONDENTS.

VIII of 1859, *section* 204—*Summary Procedure against Surety—Execution of Decree.*

In consideration of the plaintiffs being allowed to proceed with the execution of a decree which they had obtained in the High Court, A became surety upon a bond for the payment of what might be due to the defendants by such plaintiffs in the event of their decree being reversed or modified by the Privy Council, to which an appeal was then pending.

Held, that the summary procedure under section 204 of Act VIII of 1859 might be enforced against A, as such surety. (Compare Act X of 1877, section 253.)

APPEAL from an order passed by the Judge of Zillah Hooghly.

Jackson, for the Appellant. Baboo *Sreenath Banerjea* with him.

Evans, for the Respondents. Baboo *Sham Lall Mitter*, with him.

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CHUNDER KANT MOOKERJEE v. RAM COOMAR COONDOO.

Judgment.

WHITE, *J.*

The facts of the case appear from the following judgment of the High Court (1), which was delivered by

WHITE, *J.* :—

This is an appeal against an order of Mr. Grant, the District Judge of Hooghly, directing that Chunder Kant Mookerjee (who is now the appellant before us) do pay into Court within two months from the date of the order, that is, on or before the 24th day of August 1878, the principal amount of the security bond, with interest from the 25th June 1872 to the date of payment at the rate of six per cent. per annum.

It appears that in 1869, certain plaintiffs had obtained in their favor a decision in the High Court which was under appeal to the Privy Council, and on the occasion of an application being made by these plaintiffs for execution of the High Court decree, and in consideration of the execution being allowed to proceed, did, on the 31st December in that year, execute a bond to the Judge of Hooghly, containing these terms :—" I promise and declare that if the decision of the High Court be reversed or modified by the Privy Council, then the plaintiffs, decree-holders, shall pay what may be due by them, and that in case they fail to pay, then I shall pay what may be due by them to the extent of the sum of twelve thousand rupees."

On the 25th June 1872, the Privy Council made a decree, reversing the decree of the High Court, and ordering the plaintiffs' suit to be dismissed with costs in the Courts below; and further ordering the plaintiffs to pay to the defendants the costs of the Privy Council appeal, which were assessed at three hundred and twelve pounds, ten shillings and four pence sterling. It is admitted that the plaintiffs have failed to pay to the defendants what has become due from them by reason of the Privy Council reversing the decree of the High Court. An application was then made in effect on behalf of the defendants in the suit, that execution should issue against Chunder Kant Mookerjee upon his bond under section 204 of Act VIII of 1859. It is objected in the first place that the summary procedure pointed out by section 204 does not apply to a bond

(1) WHITE and MITTER, *J.J.*

given as security for any decree except that of an original Court, and then only when the bond is given prior to the passing of such decree. It appears, however, upon the authorities (several of which have been cited, and one only of which I need refer to, viz., that reported in 1 C. L. R., 347) that the summary procedure is applicable to a bond like the present one which is given pending an appeal as a security for the performance of the decree which may be passed in the appeal.

The next objection is, that the surety only rendered himself liable under the terms of his bond to pay £312-10-4 (three hundred and twelve pounds ten shillings and four pence) the amount mentioned in the Privy Council decree as the costs of the appeal to England. But we are clearly of opinion that he is to the extent of Rs. 12,000 bound to pay not only the costs of the Privy Council appeal, but also the costs of the Courts below, if the two taken together amount to that sum, of which there is no doubt; because it is by virtue of the decree of the Privy Council that the plaintiffs have been rendered liable to pay the costs of the Courts below.

Lastly, it is objected that the order of Mr. Grant was wrong in awarding interest. In that respect we think that the appellant is right. It is clear upon the terms of the bond that he made himself liable to the extent of twelve thousand rupees, and no more. The order of the lower Court in that respect must, therefore, be modified. To that extent therefore we allow the appeal, and vary Mr. Grant's order; but in other respects we confirm the same.

Inasmuch as the two months mentioned in Mr. Grant's order have elapsed, the effect of the confirmation will be that the twelve thousand rupees may be recovered forthwith from Chunder Kant Mookerjee, and on his failure to pay the same, the property which is pledged by the bond as security for that sum will be sold.

With regard to the costs of this appeal, we think that the respondent is entitled to them; for although we have varied the order of the lower Court in respect of interest, and to that extent the appellant has succeeded, yet the point was not taken by the appellant in his memorandum of appeal, and it is not unreasonable to suppose that if the point had been taken, the respondent would have abandoned that part of Mr. Grant's order.

[CIVIL REFERENCE.]

1878.
Nov. 22nd.

No. 15 of 1878.

IN THE MATTER OF BODRU ROHMAN ... PETITIONER.

Insolvency—Act X of 1877, section 344—Application to be declared Insolvent—Collector's Court—District Court—Act VI of 1871, section 15—Act X of 1877, section 2.

An application under section 344 of Act X of 1877, for a declaration of insolvency, made by a person imprisoned by order of the Collector under the provisions of Act VII (B. C.) of 1868, cannot be entertained.

A Collector's Court, although it exercises certain powers under the Civil Procedure Code, is not a Civil Court within the meaning of section 15 of Act VI of 1871; nor is it subordinate to a District Court within the meaning of Act X of 1877, section 2.

REFERENCE under section 617 of Act X of 1877 to the High Court from the (Offg.) District Judge of Chittagong.

The terms of the reference are as follows :—

"A person named Bodru Rohman, who was imprisoned by the Collector of the District for the recovery of arrears of Government revenue under the provisions of Act VII (B. C.) of 1868, has applied to this Court under section 344 of Act X of 1877 to be declared insolvent.

Para. 2 of this section provides that "such application shall be made to the District Court which ordered his arrest or imprisonment, or, when the District Court did not make such order, then to the District Court to which the Court that made the order is subordinate."

Now as no Court, other than the District Court, has jurisdiction in trying insolvency matters, and as under the provisions of section 24 of Act VII of 1868, the Collector's procedure in realizing Government dues is to be regulated by the Civil Procedure Code, I am of opinion that, in the absence of any definite provision in Act VII, the Collector issuing the certificate which has the force of a Civil Court decree is for the time being a Court subordinate to the District Court in respect of insolvency cases. I have therefore, pending the Court's opinion on the subject, entertained the application.

It is, however, urged that as Act VII does not specify what class of Civil Court the Collector's Court corresponds to, and as he is the head executive officer in a district, he should be held to be a Civil District Court when proceeding under the above Act, and the insolvent should therefore be taken before him, and not before the Judge for disposal of his case.

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In re BODRU ROHMAN.

Judgment.

Baboo *Unnoda Prosad Bannerjee*, for the Collector.

The judgment of the High Court (1) is as follows :—

We think that the Collector's Court, under Act VII (B.C.) of 1868, is a special Court. No doubt it exercises certain powers under the Civil Procedure Code, but it is not a Civil Court in itself within the meaning of section 15 of Act VI of 1871 ; nor is it of a grade inferior to that of the District Court so as to make it subordinate to that Court within the meaning of section 2 of the new Civil Procedure Code. Any order of imprisonment, therefore, passed by the Collector under Act VII (B.C.) of 1868, cannot, in our opinion, be dealt with under section 344 of the Civil Procedure Code.

(1) MORRIS and PRINSEP, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

July 18th.

No. 1919 of 1877.

LUKHIMONI DASI . . . . . PLAINTIFF;

AND

KORUNA KANT MOITRO AND ANOTHER . DEFENDANTS.

Plaint, Form of—Frame of suit—Secondary Evidence—Lost Deed—Correct Copy—Trespass—Limitation—Act IX of 1871, *cl.* 145.

Where the owner of a tank wishes to bring a suit against a person for fishing in the tank without his permission, the plaint should be framed for the recovery of damages for trespass, and should not be based on an alleged dispossession by reason of the defendants fishing in the tank.

A copy of a deed which has been proved to be lost should not be received in evidence, and is of no value as evidence even when admitted, unless it has first been proved that the copy produced is a correct copy of the lost deed.

When a person exercises the right of fishing in a tank adversely for twelve years, his right to fish becomes absolute and indefeasible.

SPECIAL APPEAL from a decree passed by the Subordinate Judge of Rajshahye, reversing that of the Moonsiff of Nattore.

Baboo *Grish Chunder Chowdhry*, for the Appellant.

Baboo *Kishory Mohun Roy*, for the Respondents.

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LUKHIMONI DASI v. KORUNA KANT MOITRO.

Judgment.

JACKSON, *J.*

The facts are sufficiently set forth in the judgment of the High Court (1), which was delivered by

JACKSON, *J.* :—

The plaintiff brought this suit by reason of an alleged dispossession in that the defendants had caught fish in the tank or *jalla* in dispute. The plaintiff does not say that she herself was prevented from catching fish, and therefore the suit properly should have been a suit for trespass and recovery of damages. However, it was tried as a suit for possession. On trial, the lower Appellate Court found that the defendant had received this tank as a gift from the husband of the plaintiff. The original deed of gift was not produced, but evidence was given to show that it had been destroyed and a copy was put in, which copy appears to have been referred to by the Court below. Now, we understand that there was nothing whatever to show that the copy produced was a correct copy of the original instrument, and it ought not, therefore, to have been received in evidence, and so far as that point is concerned, the decision is based upon an erroneous ground. But it has also been found that in accordance with that gift, the defendant exercised the right of catching fish, and in that respect held adverse possession for more than 12 years. So plaintiff would have no ground of action by reason merely of defendant going there to catch fish. She herself desired to show that she exercised that act of possession, but, in the judgment of the lower Appellate Court, it was on special occasions. We think that the suit was properly dismissed by the Court below, and that this appeal must be dismissed. We do not allow the cost of this appeal, because the error in the judgment probably led to this special appeal.

(1) JACKSON and TOTTENHAM, *J.J.*

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF THE EMPRESS . . . . . 1878 Sept. 21st.

AND

HARADHAN TAMULI . . . . . .

Criminal Procedure Code, section 273—Distinct Offences—Conviction—Appeal.

Where a person is charged with two separate offences in one trial, the amount of the whole punishment awarded for the two offences must be regarded as one sentence for the purpose of determining whether an appeal lies under section 273 of the Code of Criminal Procedure or not.

THIS was a case referred under section 296 of the Code of Criminal Procedure by the (Officiating) Sessions Judge of Bankura, o the High Court as a Court of Revision.

The facts of the case are these :—One Haradhan Tamuli was equired to give evidence before the Magistrate, and a summons ras accordingly issued in his name. On the day fixed for the rial he did not appear, but his attendance was procured on a absequent day when he denied that he had received the summons.

The Magistrate was of opinion that such denial was false, and irected his prosecution upon two charges—the one of disobeience to the summons, under section 174, and the other, of iving false evidence, under section 193 of the Indian Penal Code.

Both charges were tried together, and disposed of in one judgment. The Magistrate convicted the prisoner of both charges, nd sentenced him, by one and the same order, for the first ffence, to pay a fine of Rs. 20, or in default be simply imisoned for one month, and for the second to be rigorously imisoned for one month.

The prisoner appealed against both sentences. The Sessions dge held that the summons had never been served upon the used, and therefore dismissed the conviction upon the charge disobedience. He found, however, that one of the statements

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In re THE EMPRESS *v.* HARADHAN TAMULI.

Judgment.

imputed to the prisoner was false, and upheld the conviction upon the charge under section 193.

The question submitted to the High Court for its consideration was—whether, having regard to section 273 of the Code of Criminal Procedure, the Sessions Judge had jurisdiction to entertain the appeal from the minor sentence.

The following judgments were delivered by the Court (1):—

MITTER, *J.*

MITTER, *J.*:—

I am of opinion that the Sessions Judge had jurisdiction to set aside the conviction and sentence passed upon the prisoner in this case under section 174, Indian Penal Code.

The prisoner in the Magistrate's Court was put upon his trial upon two charges at the same time. It is doubtful whether this course is in accordance with the provisions of sections 452 and 453 of the Criminal Procedure Code. It is not necessary for us to express any opinion upon this question. But the prisoner having been charged with two separate offences in one trial, the amount of the whole punishment awarded for the two offences must be regarded as one sentence, for the purpose of determining whether an appeal lies under section 273 or not. I am of opinion, therefore, that the order passed on appeal by the Sessions Judge in this case is not illegal.

BROUGHTON, *J.*

BROUGHTON, *J.*:—

I agree in thinking that for the purpose of determining whether an appeal lies under these circumstances, the whole punishment must be regarded as one, and that the course taken by the Judge is legal.

(1) MITTER and BROUGHTON, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

BROJESWARI CHOWDHRANEE . . JUDGMENT-DEBTOR;

AND

TRIPOORA SOONDEREE DEBI . . . DECREE-HOLDER.

1878
June 20th

Nos. 38 & 39 of 1878.

Joint Decree—Act VIII of 1859, *section* 207—*Execution of part of Decree.*

A joint decree was passed in favour of A and B, and A subsequently applied for execution alone, alleging that B would not join with him in the application. The judgment-debtor stated, and B admitted, that more than half of the decretal money had been paid to the latter (out of Court), but the Court disbelieved the statement, and ordered execution to issue for the full amount of the decree.

Held, that the Court should, under section 207 of Act VIII of 1859, have allowed execution for half the amount of the decree only.

APPEAL from an appellate order passed by the Additional Judge of Rajshahye, affirming that of the Subordinate Judge of that District.

Baboo *Sreenath Dass*, and Baboo *Guru Dass Banerjee*, for the Appellant.

Baboo *Mohiny Mohun Roy*, and Baboo *Nullit Chunder Sen*, for Respondent.

The facts of the case are sufficiently set forth in the judgment of the Court (1), which is as follows :—

In these cases two widows, Tripoora Soonderee and Hurro Soonderee, obtained a decree for money against the judgment-debtor, appellant, before us. There was a joint decree passed in favour of these widows. Tripoora Soonderee applied to the lower Court under section 207 to execute the whole decree upon the ground that her co-judgment creditor, Hurro Soonderee, was unwilling to join her in executing the decree. In this application Tripoora Soonderee admits that the share of Hurro

(1) MITTER and MACLEAN, *J.J.*

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BROJESWARI CHOWDHRANEE v. TRIPOORA SOONDEREE DEBI.

Judgment.

Soonderee is one-half. The judgment-debtor resisted this application for execution on the ground that almost the whole of the money due under the decree had been paid to Hurro Soonderee, and Hurro Soonderee supports that statement of the judgment-debtor; but both the Courts below have found upon the evidence that it is not correct, and that in point of fact nothing has been paid by the judgment-debtor to Hurro Soonderee. Upon this finding of fact, the Courts below have directed that Tripoora Soonderee should be allowed to execute the whole of the decree against the judgment-debtor, and that, on the money being realized, orders would be passed for the protection of the interest of the other judgment-creditor. Against this order the judgment-debtor has appealed. Her contention is, that at any rate, according to the admission of Tripoora Soonderee, her share is only one-half in the decree; and as Hurro Soonderee admits the payment of more than the half share of this decree, the lower Courts ought not to have allowed Tripoora Soonderee to execute the decree for the whole amount, but should only have allowed her to execute the decree for the balance; namely, one-half share of the decree, considering that the other half share has already been paid.

We think that this contention is correct.

Under section 207 of the Code of Civil Procedure, the Court, allowing one of the joint decree-holders to execute the whole decree, is directed to protect the interests of the other judgment-creditors. In this case Tripoora Soonderee admits that her share is only one-half, and Hurro Soonderee also admits that she has received from the judgment-debtor more than the half share to which, according to the admission of Tripoora Soonderee, she was entitled. Under these circumstances, it was not necessary to pass any orders for the protection of the interests of the other decree-holder, and upon the admissions of Tripoora Soonderee that the share of Hurro Soonderee in the decree was one-half and of Hurro Soonderee that she has already received more than that half share, the lower Court should have allowed the decree to be executed in accordance with these admissions, considering the other half share as admittedly paid. We, therefore, modify the decree accordingly.

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As regards costs, it seems to us that in the Court below the decree-holder, Tripoora Soonderee, never contended that her share was more than one-half, and as the judgment-debtor objected on the ground that the decree could not be executed at all, we think that the judgment-debtor should pay the costs of the decree-holder in this Court as well as in the Courts below.

[CIVIL APPELLATE JURISDICTION.]

ARTHUR J. PEAL . . . . . PLAINTIFF;

AND

SCOTT CAMPBELL AND OTHERS . . . . . DEFENDANTS.

June 27th.

No. 1192 of 1877.

Wild Animals—Animals Feræ Naturæ—Ownership—Animus Revertendi—Recapture.

A tame female elephant escaped from her master's field in company with a herd of wild elephants and resumed her natural wild habits. The owner, plaintiff, abandoned his search after two months, and then offered a reward of Rs. 200 to any person who should recapture her. At the end of four months, she was recaptured by the defendant, who was compelled to tame her in the same way as if she had been an ordinary wild elephant. Plaintiff offered the reward of Rs. 200 to the defendant and demanded the elephant, but the demand was refused. *Held*, that under the circumstances the plaintiff had lost all claim to the animal.

SPECIAL APPEAL from a decree passed by the Judge of Assam Valley District, affirming that of the Subordinate Judge of Sibrooghur.

The facts of the case are as follows:—On the 21st of August 1875, a tame female elephant, the property of the plaintiff, strayed away from his factory in Lukhimpur with a herd of wild elephants then passing through the place. Plaintiff's servants went in search of her, and the search was continued up to the 2nd of September, when it was given up as hopeless. After that, plaintiff offered a reward of Rs. 200, and informed the Deputy Commissioner and the lessees of elephant *khets* of the loss of the animal, and that he did not abandon his claim to her. On the 24th of December 1875, the defendants, who are partners in an elephant *khet*, caught

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PEAL v. CAMPBELL.

Judgment.

the lost elephant and three others in their stockade. The lower Appellate Court found that at the time of her capture she was to all intents and purposes a wild elephant. On the 24th of February 1876 the plaintiff tendered the amount of the reward and demanded back the elephant. The demand was refused, and plaintiff brought the present suit for the elephant or its value, which was assessed at Rs. 1,100.

The Court of First Instance dismissed the suit, and this decision was affirmed on appeal. Plaintiff then brought this special appeal.

Evans, for the Appellant, contended that the case of *Chytun Churn Das*, vs. *Collector of Sylhet*, 21 W. R., 76, relied on by the lower Appellate Court, was not in point.

The Respondents did not appear.

The judgment of the Court (1) was delivered by

JACKSON, *J.*

JACKSON, *J.*:—

We see no reason to doubt that the Judge has properly applied the principles of law to which he refers. The animal in question had escaped from its master's premises, or from the place where it had been left to graze, in company with other elephants which were wild; and not merely did not return to its master's house but kept aloof from any habitation of man, and resumed unmistakeably the wild habits which had been familiar to it before its capture; and after recapture had to be treated precisely in the same manner as other wild elephants. The pursuit, such as it was, had ceased, as the Judge points out, a considerable time before the animal was recaptured. It appears to us clearly under the circumstances that the ownership of the plaintiff had come to an end, and that the suit was properly dismissed. The appeal will be dismissed without costs, the respondent not appearing.

(1) JACKSON and TOTTENHAM, *J.J.*

[CIVIL APPELLATE JURISDICTION.]

HURRO DOORGA CHOWDHRANY... ... (JUDGMENT-DEBTOR) APPELLANT;

AND

MAHARANEE SHURRAT SOONDERY DABEA... (DECREE-HOLDER) RESPONDENT.

1878 *Nov. 22nd.*

No. 181 of 1878.

Mesne Profits—Interest, Calculation of.

A judgment-creditor, who has been kept out of possession for several years, is entitled not merely to bare rental, but to compensation for the loss he has sustained. Under ordinary circumstances, therefore, in a suit for mesne profits where the decree-holder has been kept out of possession for several years, interest should be calculated upon the rental at the end of each year upon which it accrued due; and the aggregate of the sums due for rent and interest thereon for each year constitute the mesne profits, upon which interest may be directed by the decree to be paid until realization.

Quære—Whether the definition of "mesne profits" in section 211 of Act X of 1877 contemplates the calculation of interest as above.

APPEAL from an Original Order passed by the Officiating Subordinate Judge of Mymensing.

Baboo *Gooroo Dass Banerjee*, Baboo *Rash Behary Ghose* and Baboo *Jogesh Chunder Roy*, for the Appellant.

Baboo *Mohiny Mohun Roy*, and Baboo *Sreenath Dass*, for Respondent.

In this case the respondent had obtained a decree in the lower Court for mesne profits. The judgment-debtor appealed against the order of the Court on two grounds: first,—that the assessment of the profits was excessive, allowance not having been made for the fact that certain lands which were in cultivation at the time of the Ameen's enquiry had not been in cultivation previously; secondly,—that the profits had been calculated from Shrabun 1281, and not from Assar 1280, the date on which the decree was obtained. Upon the evidence, the High Court held that the assessment was not excessive, and further that, owing to the

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HURRO DOORGA CHOWDHRANY v. MAHARANEE SHURRAT SOONDERY DABEA.

Judgment.

action taken by the debtor himself, the decree-holder had not obtained possession until Shrabun 1281. The appeal was accordingly dismissed with costs. The decree-holder preferred a cross-appeal.

The particulars of the cross appeal are sufficiently set forth in the following judgment of the High Court (1) thereon :

A cross-appeal has been preferred by the decree-holder. It is to the effect that the lower Court has acted upon a wrong principle in assessing the mesne profits; that it has simply added together the totals of the rents which the Ameen has found to have been paid in each year to the judgment-debtor by the ryots, and not taken into account the loss which the judgment-creditor has sustained during the long period of dispossession. In support of his argument, he refers to the judgments of this Court, to be found in 14 W. R., 151; 17 W. R., 228, and 19 W. R., 87, the effect of which is, that not merely the bare rental of each year, less the collection charges, is to be ascertained, but the actual loss which the party ousted has sustained by not having the use of his money during the period that he is kept out of possession.

The reply made to this objection is, that the decree does not permit any interest upon mesne profits until after those mesne profits have been ascertained, and that this is simply an application to have mesne profits at compound interest. Looking at the decree, it appears that it only allows interest upon the consolidated sum arrived at by the Court as mesne profits after such mesne profits have been ascertained. There is no reason, however, why the lower Court in assessing the mesne profits should not have allowed interest upon each year's rent as compensation for the loss of the money. We think, therefore, that the contention of the decree-holder in this cross-appeal is right, and that the principle laid down in 14 W. R. and other decisions of this Court ought to have been followed. The judgment-creditor, who has been kept out of possession, is entitled not merely to bare rental, but to compensation for the loss he has sustained. Under ordinary circumstances, therefore, if the decree-holder has been kept out

(1) MORRIS and PRINSEP, *J.J.*

of possession for several years, interest should be calculated at the end of each year upon the rental which he would be entitled to receive, and could receive, from the ryots for that year. In the present instance, where the dispossession extends over eight years, interest should be charged for seven years on the aggregate of the rents received or realizable the first year, for six years on the rents received or realizable the second year, and so on; and thus the aggregate of these sums should constitute the mesne profits which it was the duty of the lower Court to ascertain and determine. Interest on this consolidated sum would then run as provided for in the decree. It may be a question how far the definition of mesne profits, as given in section 211 of the new Civil Procedure Code, is in accordance with the decisions of this Court above referred to. But we do not think it necessary to enter upon this point, as the present case undoubtedly falls under the provisions of the old Code.

The decree, therefore, of the Subordinate Judge will be amended in this respect, in that on the sum ascertained by the Ameen as the assets, less collection charges derived each year from the estate; interest at six per cent. per annum will be allowed. Interest will be calculated upon each year's mesne profits up to the date of the decree of the lower Court, and interest will be given by the decree upon the consolidated sum from that date to the date of realization.

[CIVIL APPELLATE JURISDICTION.]

1878 Dec. 11th.

No. 101 of 1877

BROJENDER COOMAR ROY CHOWDHRY.. APPELLANT;

AND

SREEMUTTY BROMMOMOYEE CHOWDHRAIN . . . . . RESPONDENT.

Stamp Act XVIII of 1869, *Sch. II, section* 5—*Entry in Hathchitta—Acknowledgment of debt.*

Although the intention of the parties in requiring the signature or seal of the borrower to the entries in the *hathchitta* of each sum borrowed is to secure an acknowledgment that the sums have been advanced, such entries, where they are not detached from the account of which they form part, are not such notes or memoranda written in a book as require to be stamped under Sch. II, section 5 of the Stamp Act, XVIII of 1869 (Cf. Act I of 1879, Sch. I, No. 1.)

REGULAR APPEAL from a decision passed by the Second Subordinate Judge of Zillah Dacca.

Baboo *Sree Nath Dass*, and Baboo *Kali Churn Banerjee*, for Appellant.

Baboo *Mohiny Mohun Roy*, and Baboo *Baikunt Nath Dass*, for Respondent.

The facts are sufficiently set forth in the following judgment of the High Court (1), which was delivered by

WHITE, J. WHITE, *J.* :—

The plaintiff Brojender Coomar Roy Chowdhry, who is appellant before us, has sued three defendants, one of whom alone, Brommomoyee Chowdhrain, is the respondent in this appeal, to recover a sum of Rs. 20,825.

He alleges in his plaint that these three defendants borrowed that sum on seven different occasions between the 23rd Aug and the 12th Kartic of 1281, and that the several advances were each entered at the time of borrowing in a *hathchitta*, which

(1) WHITE and MITTER, *J.J.*

produced, and which purports against each item to bear the signature of the male defendant and the seal of the two female defendants, of whom Brommomoyee is one. The lower Court has passed a decree against two of the defendants, namely, Sampadmoni and Mohinee Chandra, for the whole amount claimed, but against the second defendant, who is the respondent before us, only for the first item appearing in the *hathchitta*, viz., Rs. 3,500 and interest. A one-anna adhesive stamp was affixed at the head of the defendant's account in the *hathchitta* which the Court has appropriated to the first item of advance contained in the account. But as regards the remaining six items, no stamp being affixed against any of them, the Subordinate Judge has yielded to Brommomoyee's objection that they are inadmissible in evidence for want of stamp, and has not considered itself at liberty to consider the evidence adduced by the appellant to show what the advances to which these six entries relate were made. Hence the decree against Brommomoyee is confined to the amount of the first advance. The difficulty of the stamp with regard to the remaining six advances was got over in the case of the first and third defendants, because the Court held that upon their pleadings they had admitted the whole sum claimed in the suit to be due, and they have not appealed against the decree which the Court has accordingly passed against them.

The first point we have to consider is, whether the entries in question require a stamp or not. The provision in the Stamp Act, under which the lower Court holds that a stamp is required, is the 5th Article of Schedule II. That article imposes a one-anna stamp upon a particular note or memorandum. The words of the article descriptive of the document to be stamped, and which are considered by the Court below to apply to each item in the *hathchitta*, are these: "A note or memorandum written in a book whereby a debt or part of a debt amounting to Rs. 20 or upwards is acknowledged to be due." Now, if any one of the entries in the *hathchitta* had stood alone and had been intended by the parties to form an isolated entry in the book, it might have been contended with considerable force that it fell within the description of document mentioned in the 5th Article as requiring a stamp. We think, however, that the entries

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BROJENDER COOMAR ROY CHOWDHRY v. SREEMUTTY BROMMOMOYEE CHOWDHRAIN.

Judgment.

WHITE, J.

cannot be detached from the account of which they form a part. That account has two sides to it: the one headed "amount advanced," and the other "amount received." The amount due varies from time to time and depends upon the relation of the amount advanced to the amount received. In the present case no sum is entered under the head of "amount received," but that is an accident, and makes no difference in considering the question as to what is the nature of the document which is offered in evidence. The intention of the parties in requiring the signature or seal of the borrowers to each sum advanced is, strictly speaking, to secure under their hands an acknowledgment that the sum is advanced. Whether or not that sum is due, or a larger sum or a less sum, depends upon the state of the account. In determining whether a document comes within the description of a document upon which a stamp is imposed by the Stamp Act, we must look at the entire document, and see whether it fairly falls within the description.

The document in this case, which is offered as evidence, is not a note or memorandum acknowledging a debt or part of a debt to be due, nor a series of such entries and memoranda, but an account between the parties of the character above mentioned, and as such, did not, in our opinion, require a stamp. As it appears that all the evidence is before us which the parties intended to produce, we are not at liberty to remand the suit, but must dispose of it upon the evidence before us.....

(His Lordship then discussed the evidence before the Court, and upon consideration of all the facts, arrived at the conclusion that the plaintiff's contention must prevail.)

We, therefore, vary the decree of the lower Court by directing that the plaintiff do recover the Rs. 20,825 from all the three defendants, Sampadmoni, Brommomoyee, and Mohinee, with costs and interests at the rate of six per cent.

The plaintiff, appellant, will get his costs in this Court upon the whole amount of his claim.

[CIVIL APPELLATE JURISDICTION.]

BANY MADHUB TRIVADI (DECREE-HOLDER) . APPELLANT;

AND

RAM GOPAUL SIRCAR (JUDGMENT-DEBTOR) . RESPONDENT.

1878 *Dec. 20th.*

No. 233 of 1878.

Interest upon Decree—Execution delayed by Decree-holder.

The fact of a decree-holder having delayed for a considerable time to take out execution of his decree is no ground for the Court refusing to allow him interest at the rate directed by such decree to be paid upon the principal sum recovered, from the date of decree until realization.

APPEAL from an order passed by the Subordinate Judge of Moorshedabad.

Baboo *Bhobany Churn Dutt*, for Appellant.
Baboo *Kally Kissen Sen*, for Respondent.

The facts appear from the following judgment of the High Court (1), which was delivered by

WHITE, *J.*:—

WHITE, *J.*

This is an appeal against a portion of an order made by the Subordinate Judge of Moorshedabad in the course of executing a decree. The decree was made in August 1872, and shortly afterwards execution was taken out.

The judgment-debtor raised objections which were overruled, and he appealed to the High Court.

That appeal was determined in the latter part of the year 1875, and on the 15th December of that year the record was sent back to the Subordinate Judge of Moorshedabad, but the decree-holder did not take out execution afresh until the 29th July 1876. The decree was one that directed the payment of interest on the principal sum recovered from the date of the decree until realization.

(1) WHITE and MITTER, *J.J.*

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BANY MADHUB TRIVADI v. RAM GOPAUL SIRCAR.

Judgment.

WHITE, J.

The interest awarded is at a very high rate, viz., 18 per cent.

The lower Court in the course of the new execution proceedings has disallowed to the creditor interest between the 15th December 1875, and the 29th July 1876, on the ground that the decree-holder had shown dilatoriness in taking out execution, and that the judgment-debtor is consequently entitled to be relieved from paying interest for the interval I have mentioned.

Now there is an apparent justice in this, but only an apparent one. If the decree-holder was dilatory in taking out execution, the judgment-debtor was still more dilatory in not paying the decree as soon as the record was returned to the Court below in December 1875. It was his duty to pay off the decree without putting the creditor to take out execution, and it is in truth owing to this dilatoriness of the judgment-debtor that the creditor was compelled to take out execution on the 29th July 1876; and, as the decree awarded interest upon the principal sum recovered until realization, he is entitled to receive interest until that event happens.

The order of the lower Court must, therefore, be amended by giving the decree-holder interest from the 15th December 1875 to the 29th July 1876, at the rate mentioned in the decree. The appeal is allowed with costs.

[CRIMINAL REFERENCE.]

HE EMPRESS . . . . . 1878. Nov. 12th.

AND

)YLUKHO NATH CHOWDHRY AND OTHERS . . . . .

lian Penal Code, section 108, *expls.* 2 *and* 4—*Theft—Removal of Goods with Owner's Permission—Abetment.*

The owners of certain goods having been informed by a servant in their employ of a proposal made to him by the accused that he should join him in removing and converting such goods to their own use, allowed the accused so to remove the goods: In the act of removal the accused was arrested and charged with theft and with having abetted the commission of the offence of theft.

Held, that no theft had been committed, the goods having been removed with the knowledge of the owners.

Held further, that the accused was guilty of abetment, although the technical offence of theft had not been committed.

EFERENCE to the High Court under section 240 of the sidency Magistrates Act.

'he following are the terms of the Reference :—

The above defendants were charged under section 380 of the Indian al Code with stealing some iron and brass screws from the godowns of srs. Mackinnon, Mackenzie & Co., at Fairlie Place. The following facts e proved in the case :—Messrs. Mackinnon, Mackenzie & Co. were in habit of selling hardware by public auction through the agency of srs. Mackenzie, Lyall & Co. For the purpose of these sales, a Sircar l to come from the Exchange to the godown, lot the goods and take y samples upon which the auctions were held ; after the sales the same ar came with the purchaser and made delivery of the goods; the last took place on the 16th of August; on the 19th, the first defendant came eliver some goods; and then asked the godown-keeper, Mr. Cummins, low him to take out more goods than what were actually mentioned in atalogue of sale, the profits to be divided among them in the propor- of 6 to 10. Cummins mentioned this to Mr. Moncreiff, who represented owners; and with his permission he assented to the first defendant's sal; the plan was finally matured at Cummins' house on the 24th of st; on the 4th of September the first defendant came accompanied

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THE EMPRESS v. TOYLUKHO NATH CHOWDHRY.

Judgment.

by the 2nd and 3rd defendants who were purchasers, and pursuant to the agreement between the first defendant and Cummins, goods in excess of those mentioned in the catalogue were removed; but the Police who had been communicated with were on the watch and immediately arrested the defendants. It was also proved that it was a frequent practice in the trade for the purchasers to take excess goods by giving a receipt to Mackenzie, Lyall's Baboo (in this case the first defendant) who on his part gave a receipt to Mackinnon, Mackenzie & Co.; and that the purchaser had no concern whatever with the sellers' firm. There being absolutely no legal evidence of guilty knowledge as against the purchaser defendants, I have discharged them. With reference to the first defendant, I have held that inasmuch as he removed the articles with the express or implied consent of the owners, his act did not amount to theft; (explanation 5 to section 378 of the Indian Penal Code; *Reg.* vs. *Dolan*, 6 Cox., C.C., 449; *Reg.* vs. *Hancock*, Law Times, July 27th, 1878). I have held further that the first defendant is liable to a conviction under section 116, as explanation 4 to section 108 appeared to me to show that, though the offence of theft might not have been committed, yet as the accused instigated Cummins to abet him in the commission of the theft, he is guilty under the section referred to. As, however, I entertain some doubts, I solicit the opinion of the High Court on both these points, viz.: (1) Whether, in view of the fact that the goods were removed with the consent of the owners, the act of the defendant amounts to theft; and (2) whether the defendant under the circumstances is liable to a conviction under section 116. I have passed judgment subject to the decision of this Honorable Court, but have reserved sentence for a fortnight. I have remanded the prisoner to custody, subject to any order the Honorable Court may be pleased to make with reference to bail."

Bell, for the Prosecution.

The following judgments were delivered by the High Court (1):

JACKSON, *J.*

JACKSON, *J.* :—

It appears to me that under explanation 4 of the 108th section of the Indian Penal Code, the abetment of an abetment being an offence, and the prisoner having instigated Cummins to do that which, if committed, would have been an offence, he has himself thereby committed an offence, and, inasmuch as by explanation 2, to constitute the offence of abetment it is not necessary that the act abetted should be committed, therefore the circumstance that owing to the property being removed with the knowledge of the owner, the technical offence of theft had not been committed, does not save

JACKSON and WHITE, *J.J.*

isoner from the consequence of the abetment which he has 1878
uilty of, and therefore he has been properly convicted. The
r will be brought up before the Magistrate for sentence.

, *J.* :—

ree in thinking that upon the facts found by the Magis-
the prisoner may be properly convicted of the offence of
ng an offence.

[CRIMINAL REVISIONAL JURISDICTION.]

EMPRESS . . . . . *July 29th.*

AND

DAI SINGH . . . . . .

Penal Code, section 193—Imprisonment, Sentence of—Criminal Procedure Code, section 297, clause 6.

Under section 193 of the Indian Penal Code, it is obligatory upon Court, in every case of conviction under that section, to pass e sentence of imprisonment.

Khodai Singh was charged before the Sessions Judge of t with giving false evidence in a judicial proceeding, and guilty under section 193 of the Indian Penal Code. The sentenced him to pay a fine of Rs. 100, or in default to be ply imprisoned for one month. The case now came before gh Court in its Revisional Jurisdiction.

following judgments were delivered by the High (1) :—

y, *J.* :— MARKBY, *J.*

on 193 seems to make it imperative upon the Court s some sentence of imprisonment in every case of ion under that section. This omission might be cured, without giving notice to the prisoner, and as he has no injury, and the Crown does not complain, I do not necessary that we should interfere.

(1) JACKSON, MARKBY and PRINSEP, *J.J.*

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THE EMPRESS v. KHODAI SINGH.

Judgment.

PRINSEP, *J.*

PRINSEP, *J.*:—

In my opinion we *must* "annul" what is undoubtedly an illegal sentence, and "pass a sentence in accordance with law,"—see section 297, clause VI, Code of Criminal Procedure.

This matter has "come to the knowledge" of the High Court on perusal of the Sessions statements of the District of Tirhoot. The Sessions Judge has sentenced a convict to fine only on conviction of intentionally giving false evidence (section 193, Penal Code), where the law provides imprisonment *and* fine, not *or* fine as a punishment for that offence. It seems to me that we cannot allow this illegal sentence to stand. It may, in the present instance, amount to a mere matter of form, as the Sessions Judge has recorded that the offence committed is not a serious one; but as a matter of principle, I think that a proper sentence must be passed, and that we cannot pass over this error.

The convict should be called upon to show cause why the sentence passed on him by the Sessions Judge of Tirhoot should not be set aside, and a proper sentence passed in accordance with law.

JACKSON, *J.*

JACKSON, *J.*:—

The papers of this case were laid before me on the 24th July.

Khodai was convicted before the Sessions Court of Tirhoot of an offence under section 193, Indian Penal Code, and sentenced to pay a fine of Rs. 100, or in default to be rigorously imprisoned for one month.

The Code (section 193) directs that a person guilty of such offence "shall be punished with imprisonment ..... and shall *also be liable* to fine;" and thus it is clear that the sentence of imprisonment is obligatory, and that of fine, discretional.*

* The Schedule attached to the Code of Criminal Procedure is, perhaps, misleading, as it does not preserve this distinction.

We must, I think, assume that the Legislature has deliberately (in my opinion most wisely) determined that every person who is convicted of giving false evidence should be marked with the stigma of imprisonment, and it is the duty of the Court to carry out that intention.

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THE EMPRESS v. KHODAI SINGH.

Judgment.

JACKSON, *J.*

In the present instance, the accused had given false evidence in a judicial proceeding, and the Judge who convicted him says: "The false statement in question, I judge under the surrounding circumstances, was made intentionally and deliberately, and it certainly had a material bearing on the result of the trial for theft, compelling the Joint Magistrate to acquit the defendants charged with that offence."

The Sessions Judge then continues, unaccountably as it seems to me: "Taking everything into consideration, I am not inclined to pass a heavy sentence," and he proceeds to pass that which is under consideration.

I am of opinion that the irregularity is one which this Court is bound as a Court of Revision to correct, and if the proper sentences of imprisonment had appeared to be a nominal one, I should not have thought it necessary to give notice, as the Code of Criminal Procedure expressly takes away the right of being heard, and the law is too clear to admit of argument; but as I am not satisfied that the imprisonment ought to be nominal, I agree with my brother PRINSEP, that notice should be given to Khodai Singh to show cause why the Court should not proceed to pass on him such sentence of imprisonment as it deems proper.

[CIVIL APPELLATE JURISDICTION.]

1878 Dec. 18th. — No. 112 of 1877.

RADHA MOHUN MUNDUL AND ANOTHER . APPELLANTS;

AND

SOSHI BHOOSUN BISWAS AND OTHERS . . RESPONDENTS.

Hindu widow, Decree against—Sale Certificate—Evidence—Reversionary Heirs, Right of.

Where an estate is sold in execution of a decree which in form is a personal decree against a widow, and the sale certificate purports to pass only the right, title and interest of such widow, the purchaser at such sale cannot, in a suit by the reversionary heirs of the husband for possession of the property, give evidence to show that the debt for which the property was sold was chargeable on the estate of the deceased husband, with a view to establishing a right to more than the widow's interest.

Baijan Doobey vs. *Brij Bhookun Lall Awasti*, L. R., 2, Ind. App. 275, cited.

REGULAR APPEAL from a decision passed by the Subordinate Judge of Hooghly.

Evans, for Appellants.

Baboo *Mohesh Chunder Chowdhry*, for Respondents.

The facts of the case are sufficiently set forth in the judgment of the High Court (1), which was delivered by

WHITE, J. WHITE, *J.*:—

The plaintiffs, who are respondents before us, have brought this suit against the defendants, who are the appellants, for the purpose of recovering certain property out of their possession. The plaintiffs allege that they are the reversionary heirs of one Digambur Mundul, deceased; that he died leaving the property in question and also a widow as his immediate heir; that she died on the 2nd of Assar 1280, which is before suit; and that on her death they became entitled to the property as such reversionary heirs.

(1) WHITE and MITTER, *J.J.*

The defendants do not dispute that the plaintiffs are the reversionary heirs of Digambur, or that the widow is dead, or that the property sued for formed a portion of Digambur's estate. But their defence, is that they, on the 12th September 1868, and five years before the death of the widow, purchased the property for Rs. 15,050 at a sale held in execution of a decree obtained by one Bissonath against the widow. That decree was for the sum of Rs. 23,736 odd, purporting to have been lent to the widow by Bissonath, and to have been secured by a mortgage of the property in suit together with other properties which the widow had inherited from her deceased husband. The defendants allege the money was borrowed by the widow under such circumstances as entitled her to charge the loan upon the estate of her deceased husband. The defendants claim in effect that they have purchased the inheritance in the property, and that the sale is a good and valid sale, inasmuch as the loan was made under a legal necessity.

The lower Court has decreed the plaintiff's suit, and in so doing has pronounced a very elaborate and careful judgment dealing with every question that was raised by the defendants. The Court below does not appear to have pronounced a decided opinion upon what is the first question in the case, whether the defendants have by the execution sale acquired the inheritance of the property, although it evidently inclined against the defendants on this point, but proceeding to consider the alleged consideration for the mortgage it found that the money was not satisfactorily proved to have been advanced, and assuming that it was actually advanced, there was no legal necessity proved for the borrowing.

The appeal has been argued before us at great length, and Mr. Evans, the Counsel for the defendants, has entered exhaustively upon the questions decided by the lower Court. It appears to us, however, upon a consideration of the title of the defendants, that we need not pronounce an opinion upon these questions. It lies upon the defendants in the first instance to satisfy the Court that they have bought the inheritance and not merely the widow's interest in the estate. Their document of title consists of the certificate of sale dated the 7th November 1868. The material parts of that certificate run in this way: "Bissonath Chunder,

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RADHA MOHUN MUNDUL v. SOSHI BHOOSUN BISWAS.

Judgment.

WHITE, J.

decree-holder, having in execution of the decree in the original suit No. 7, decided on the 15th May 1868, put in a petition for the sale of the moveable and immoveable property of the judgment-debtor Romonee Dassi, inhabitant of Moheshwarpore in Perguunah Magara, and a proclamation of sale having been thereupon served in the usual manner, a public sale took place on the 12th September 1878. Radha Mohun Mundul and Kali Kisto Mundul (that is, the present respondents) having at this sale purchased at auction the right, title and interest of the judgment-debtor in the undermentioned properties at a consideration of Rs. 15,050, and deposited the whole of the consideration money, the certificate is granted to the said auction-purchasers as evidence of the purchase of the said properties, and it is made known that whatever right, title and interest the judgment-debtor had in the said auction-sold properties having terminated on the 12th September 1878, the day of the sale, have vested in the auction-purchasers Radha Mohun Mundul and Kali Kisto Mundul, and that this certificate will be regarded as a valid deed of transfer of the said right, title and interest." There can be no doubt that upon this certificate of sale, taken by itself, and giving the words their ordinary meaning, the only interest which the defendants acquired was the right, title and interest of the judgment-debtor alone, that is, of Romonee. That certificate, however, is not, as the authorities show, conclusive as to what passes by the sale. Another document has to be looked at which is even more important than the certificate of sale, namely, the decree under which the sale was made, and to which the certificate relates. If, on the face of the decree, it should appear that the subject-matter of the decree is a debt from the deceased husband or a debt of the widow which was properly chargeable upon and actually charged upon the husband's estate by the widow, then according to the authorities the certificate of sale would or might have a more extended operation. On referring, however, to the decree obtained by Bissonath against the widow, we find that in its form it is a personal decree against the widow. She is described simply by her name and as an inhabitant of a particular place. She is not even described as the widow of Digambur Mundul, deceased. We also find that in the prefatory part of the

decree the money which the widow borrowed, is stated to be borrowed for her own purposes. It is true, that it also states that certain properties (some of which are the subject of this suit) had been mortgaged for this loan, but there is no statement that the loan was of that character which entitled the widow to charge it upon the inheritance, nor that the loan was in fact charged upon the inheritance.

Such being the contents of the documents on which the defendants must rely to prove their title, we must hold that they have failed to show that they have under the execution sale acquired more than the widow's interest in the property in dispute.

The case of *Baijan Doobey* vs. *Brij Bhookun Lall Awasti*, L. R., 2 Ind. App., 275, shows that the question to be considered by the Court in determining whether a sale made in execution of a decree against a widow is confined to her limited interest in her husband's estate, or extends to the inheritance which she represents, are these—"What is it that is liable to be sold under the decree, and what in fact is sold?" The case I have cited, as well as the other authorities, show that these questions are to be decided upon view of the decree and the sale proceedings, and that it is not open to the Court to go beyond these documents. We think that in the case before us the answer to those questions is, that under the decree obtained by Bissonath, Romonee Dassi's interest in the property was liable to be sold and that interest alone was sold.

Mr. Evans argued that, inasmuch as under the Code of Procedure which was in force at the time of the defendant's purchase, the right, title and interest only of judgment-debtors could be sold, no form of decree or sale certificate could have been adopted which would clearly show whether the intention of the parties was that the inheritance should be sold or only the limited interest of the widow in the same. But we cannot accede to this argument. It is perfectly clear that it was open to Bissonath to obtain a decree, if he were entitled to it, which would unquestionably have warranted a sale of the inheritance. So also a certificate of sale might easily be framed so as not only to include the widow's limited interest, but also her interest as representative of the estate of her husband.

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The judgment of the Privy Council in the case of *Baijan Dooby* indicates the form of certificate which the Court might expect to find where the intention was that the sale should embrace the inheritance. Holding as we do that the defendant's title expires on the death of the widow, it is unnecessary to enter upon the other questions raised by this appeal.

The result is, that we must dismiss this appeal, and affirm the decree of the lower Court with costs.

[CIVIL APPELLATE JURISDICTION.]

August 24th.

No. 2545 of 1877.

CANUNGOE RAGHUBANUND DAS . . . . DEFENDANT;

AND

SADHU CHURN DAS . . . . . PLAINTIFF.

Joint Family—Mitakshara Law—Adopted Son, Share of—Specific Share, Right to—Representation—Partition, Right to.

In an undivided Hindu family governed by the Mitakshara law no member has a vested right to a specific share in the family property.

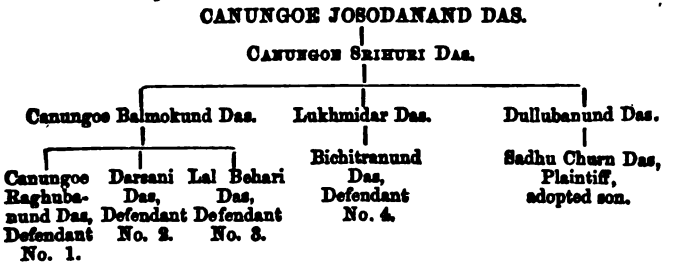
If, in an undivided Mitakshara family consisting of three brothers, one of the brothers dies leaving an adopted son, the share of that son, on partition of the property which descended to the three brothers, will be only half of that which his adoptive father could have claimed had the latter been alive at the date of partition.

In an undivided Hindu family governed by the Mitakshara law, an adopted son and the adopted son of a natural son stand exactly in the same position on partition.

APPEAL from an appellate decree passed by the Judge of Cuttack, affirming that of the Subordinate Judge of that district. The material portions of the judgment appealed from are as follows :—

"This appeal was remanded by the High Court in order that it might be considered and determined with reference to the principle laid down in the case of *Indromoni Sadkhan* vs. *Srinath Sadkhan*, whether article 12 schedule II of the Limitation Act did or did not apply; if it did not apply then whether the defendants had not gained a title by 12 years' adverse possession before the Limitation Act of 1871 came into force; also to determine, if limitation is not a bar, the extent of plaintiff's share on the facts found or admitted.

"It will not be out of place to state the facts of the case as those are not contained in the judgment of the lower Court or in the former judgment of this Court. The genealogical tree given in the plaint, and the correctness of which is undisputed, is this :—



"The suit is for a one-third share of the family property. These facts are admitted that plaintiff, the natural son of Balmokund, is adopted son of Dullubhanund, that the latter predeceased his father, leaving plaintiff a minor. The plaint represents that Dullubhanund died in 1263, and the allegation is not contradicted; indeed the whole evidence on both sides goes to show that he died in that year, and that his father Srihuri, the grandfather of the minor, died a year afterwards. The plaintiff alleged that he attained his majority in Assar 1278, and the Subordinate Judge found as a fact that allowing for his minority he had, under the provisions of sections 3 and 7 of the Limitation Act, instituted this suit within the time allowed from Srihuri's death, so that even if he had been out of possession from that time, his claim would still not be barred.....The defence of the defendant is, that the rule of primogeniture prevails in the family, and also that limitation applies, because plaintiff's father had separated from the latter's father Srihuri, and took at the time of separation (stated in the answer to be 1258) 12½ mans of land. The question of primogeniture was decided against defendant in both Courts; it forms no part of the order of remand, and I have nothing to do with it except in so far as any proof of exclusive possession on the part of defendant's father Balmokund affects the question of adverse possession to the plaintiff. If I had to decide it, I should on the evidence have no hesitation in confirming the decision of the lower Court.....

"I think it is clear that the claim is not barred, and that plaintiff is entitled to a share, as the possession of Srihuri must be held to be that of Dullubhanund equally with that of Balmokund, no satisfactory proof of partition, exclusion or relinquishment having been given.

"The next point is as to the share of plaintiff. It is contended that as an adopted son he is not entitled to an equal share with his paternal uncle, that at the most he is only entitled to what his father would have received if the latter had been an adopted son, and the authorities relied on are Sutherland's Dattika Chandrika, section 5, para. 26, page 169, and Shama Churn Sircar's Vyavastha Durpana, pages 974, 976, paras. 635 to 638. Con-

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Statement.

ceding that these passages taken together bear the construction which they seem to do, viz., that when a grandson and his paternal uncle (the legitimate son of his father) succeed to the estate of the former's deceased grandfather, the grandson would only succeed to the share which would have devolved upon a father of the same description as himself, that is to say, if he was an adopted son, he would receive an adopted son's share, if he was the legitimate son of an adopted father, he would receive a legitimately begotten son's share. I am not at all satisfied that the rule would be applicable to a case governed by the Mitakshara Law. I may add that taking by itself the passage in Sutherland's Book, (para. 25, page 169) it would be difficult to deduce any such rule from it, though the interpretation which I have given seems the most reasonable one. In Bengal a son during the lifetime of his father acquires no interest in his father's property, his title only accrues on the father's death. If, therefore, he died leaving a son, born to him or begotten, he would have died without himself acquiring any right or interest in his father's estate, and it may well be that the grandson succeeding as heir to his grandfather, his share would be determined by his own personal status, whether as a legitimately begotten or an adopted son. Under the Mitakshara Law the case is otherwise; a son by birth acquires in his father's property an interest which is of the nature of an inheritance. And the same may be said of a grandson. The son could at any time demand a partition and secure for himself his own proper share in the property. In property which belonged to the grandfather, the ownership of father and son would be of the same description; what would limit or terminate the father's interest, would limit or terminate that of the son also; the two interests exist together, that of the son being derived through and of the same character as that of the father. I do not see that the accident of the father's death would alter the interest of the son which had already, so to speak, become vested in him at the time of birth or adoption as the case might be. I do not know that there is any difference in the position of a son duly adopted and a son lawfully begotten in these respects, that both at the time of adoption or birth become members of the joint family and acquire an interest in the family property. It is true that there would be a difference in the shares to which they would be entitled respectively on partition, but this would be entirely as between themselves; they would be entitled to the whole of their father's share whatever it was. It seems to me then that under the Mitakshara an adopted son would be fully entitled to represent his father and take his share, and as no express authority to the contrary has been shown, I must confirm the decision of the Subordinate Judge and dismiss this appeal with all costs."

Baboo *Guru Dass Banerjea*, and Baboo *Mohendrololl Mitter*, for the Appellant.

Baboo *Srinath Dass*, for the Respondent.

The following judgments were delivered by the High Court (1) :—

MARKBY, J. :—

The only question which remains to be decided in this case is one of Hindu law, namely, to what share in the family property is the plaintiff entitled. The common ancestor of the family is one Srihuri Das; who had three sons, Balmokund, Lukhmidar, and Dallubhanund. The plaintiff is one of the sons of Balmokund, but he was adopted by Dallubhanund, who died in the lifetime of Srihuri. The defendants are the other sons of Balmokund, and the son of Lukhmidar. The plaintiff has established his right to recover a share in the family property, but while he claims one-third, just as if he were a natural son of his father, the defendants say that, as an adopted son, he is only entitled to one-sixth—the remaining five-sixth being equally divided between the sons of Balmokund and Lukhmidar.

I have had some doubt whether this question should have been raised at all in the present suit, and whether, it not being alleged that the family had separated, a suit by one member against the other members for a specific share will lie. But no objection of this kind has been raised in the Courts below or in this Court. I think, therefore, that we must take it to be the understanding of all the parties to this suit that, though there has been no actual division, the plaintiff now holds a specific share of the family property to which he may be entitled in severalty. It is upon that understanding alone that the plaintiff can obtain the decree which he asks.

The only authorities to which we have been referred upon the question we are now to determine is the Mitacsh. Ch. I, Sec. 1., v. 25, and the Dattaka Chandrika, sec. 5, paras. 24, 25. The decision turns upon the right understanding of the latter text. After stating various conflicting opinions, the author of the Dattaka Chandrika sums up the law in the 24th paragraph. As pointed out by Baboo Shama Churn in his Vyavastha Darpana, 2nd Ed., p. 974, the translation of that paragraph by Mr. Sutherland is incomplete. It should stand thus :—

(1) MARKBY and PRINSEP, JJ.

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Judgment.

MARKBY, J.

24. "Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the state of a brother or other kinsman, *the adopted son of the same description obtains his due share. And in the event of the ancestor having other sons, a grandson by adoption, whose father is dead, obtains the share of an adopted son.* Where such son may not exist the adopted son takes the whole estate even." The words in italics are omitted by Mr. Sutherland. There is no dispute between the parties to this appeal that this emendation of Mr. Sutherland's translation ought to be made.

Paragraph 25 is as follows:—"Since it is a restrictive rule, that a grandson succeeds to the appropriate share of his own father, the son given, where his adoption is the real legitimate son of the paternal grandfather, is entitled to an equal share even with a paternal uncle, who is also such description of son; therefore a grandson, who is an adopted son, may (in all cases) inherit an equal share even with an uncle. This must not be alleged, (as a general rule), for there would be this discrepancy, where the father of the grandson were an adopted son, he would receive a fourth share; but the grandson, if he were such son (of him), would receive an equal share (with an uncle in the heritage of the grandfather). "And accordingly whatever share may be established by law, for a father of the same description, as himself, to such appropriate share of his father, does the individual in question (viz., the adopted son of one adopted,) succeed? Thus, what had been advanced only is correct. The same rule is to be applied by inference to the great-grandson also." The words, "viz., the adopted son of one adopted," do not occur in the original."

But even if we strike out these words and take the two paragraphs according to their more correct version, they clearly enunciate, that upon partition an adopted son and the adopted son of a natural son stand exactly in the same position, and that each takes only the share proper for an adopted son, *i.e.*, half of the share which he would have taken had he been a natural son.

So far indeed there has been little dispute. But the plaintiff argues that this rule is not applicable to a family governed by

the Mitakshara law. This argument, which was successful in the Court below, is based upon the following reasoning: It is said that in a Mitakshara family the son's interest vests as soon as he is born. That the father of the plaintiff, therefore, had a vested right, to which upon adoption the plaintiff succeeded.

The fallacy in this argument appears to me to lie in a confusion between a vested right to joint ownership of the family property, and a vested right to a specific share therein. As I understand the Hindu law no right vested in the plaintiff's father to any specific share. No right vests in any member of the family to a specific share until some act has been done which has the effect of turning the joint ownership into several ownership. This may be done by a mere signification of intention, and when a signification of intention has once taken place which has this effect, the share of each member becomes at the same moment both several and defined. It is, as I understand the law, this signification of intention, producing concurrently these two results, which enables a member of a joint Hindu family to dispose of his own share by sale, whilst the family still remains joint which he can do certainly in some districts of India, possibly in all. The change which thus takes place is that which Lord WESTBURY in *Appovier's case* likens to the change of joint tenancy to tenancy in common under the English law. It has its origin in the power of each member of a family to demand a partition at any moment, and the inability of the family to retain any member in joint ownership longer than he may desire. This view of the position of the member of an undivided Hindu family is, I believe, in accordance with that taken by the High Court of Allahabad, where the Court clearly seems to consider that the interest of a member of an undivided family is not a specific share (see L. R. 1 All., 115).

I do not indeed see how it is possible to deny that the principle of representation is combined, to some extent, with the principle of survivorship in the law of inheritance which governs a Hindu family, and it is this combination which renders the task of ascertaining the rights of each member upon partition so extremely difficult. I feel no doubt, however, that in this particular case the plaintiff's father had no vested interest

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Judgment.

MARKBY, J.

in any specific share, and that the plaintiff himself had no such vested interest until the event happened which this suit assumes now to have happened, but at a later period, namely, that from being a joint owner, the plaintiff became what in English phraseology would be called a tenant in common. I see nothing, therefore, in the fact that the plaintiff, as member of a Mitakshara family, became upon adoption a joint owner of the family property to prevent the operation of the general rule, that as an adopted son, he will take upon partition only the half of what he would have taken had he been a natural son: that is to say, one-sixth. The result is, that the decision of the Courts below will be modified, and the plaintiff will recover a decree for one-sixth only, with costs in proportion.

PRINSEP, J.

PRINSEP, *J.*:—

I am also of opinion that the adopted grandson can inherit only one-half of that which his adoptive father would have inherited had he survived his own father, the family being joint under the Mitakshara law, and the adopted grandson having uncles (brothers of his adoptive father). There can be no doubt—and indeed it is not disputed in this case—that there are portions of the Dattaka Chandrika which have been omitted in Mr. Sutherland's translation, and which clearly established this point. It is unnecessary for me to do more than to state that these omissions have been supplied in the judgment just delivered by Mr. Justice MARKBY.

The objection raised to the application of the rule to a joint family, living under the Mitakshara law, cannot prevail. Mr. Macnaghten, almost at the commencement of the 1st Chapter of the Principles of Hindu Law, thus expresess himself:—"The various modes of acquisition, as occupancy, birth, gift, purchase, and the like, have been detailed and commented on with all the elaborate minuteness peculiar to the Hindu jurists. It seems sufficient here to enquire into the nature of that property which is created by birth; for to this source must be traced all the impediments which exist to alienation; a man without heirs, having an absolute and uncontrolled dominion over his property, by whatever means acquired. That an indefeasible, inchoate right is created by birth seems to be universally admitted, though much argument

ive discussion has been used to establish that this alone is ; sufficient to create proprietary right. The most approved ıclusion appears to be, that the inchoate right, arising from th and the relinquishment by the occupant (whether effected death or otherwise) conjointly create this right, the inchoate hts which previously existed becoming perfected by the removal the obstacle; that is, by the death of the owner (natural or il), or his voluntary abandonment. In ancestral real property, ; right is always limited ; and the sons, grandsons, and great-ındsons of the occupant, supposing them to be free from those 'ects, mental or corporal, which are held to defeat the right of ıeritance, are declared to possess an interest in such property, ual to that of the occupant himself; so much so, that he is not liberty to alienate it, except under special and urgent circum-ınces, or to assign a larger share of it to one of his descendants ın to another." The text of the Mitakshara itself bears ; this opinion. See Chapter 1, section 1, paras. 17, 18, 22, l the judgment of the Full Bench of the Allahabad High Court the case of *Debi Parshad* vs. *Thakoor Dyal,* I. L. R., 1 All., 105, ich states the law correctly in the following passage:—"The sequence of the doctrine that a right in the paternal ancestral te is acquired by birth, is that there is in fact no devolution he property from one owner to another, but that as each comes into being, he forthwith acquires a right which would, partition, reduce the shares of the other sons, and which, ıld he not survive partition and have issue, his son or grand-would take by substitution, and which, if he dies before that od, will simply lapse. There being no devolution of the perty, the laws of descent are inapplicable. An ascertainment he rights of the several members of the family is effected by tition, and consequently the rules regulating partition in ry Hindu work on inheritance take the place of rules regu-ng the descent of property from an owner leaving issue. less there is a plain direction to the contrary, rules of partition n their very nature operate at the time when the partition is le. Unless it is expressly declared that the ascertainment hares is to be made at an earlier period, it must be assumed ' are to be ascertained at the time partition is made. Seeing

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PRINSEP, J.

that a son in the undivided family is a co-owner, having acquired his right by birth, there is no more reason for fixing the date of the death of the father as the period at which shares should be ascertained, than in fixing the date of a son's death at that period: and if shares are not ascertained until the period of distribution; if, until that time, no one can declare he has any share in the common property, it accounts for the circumstance that in none of the treatises on Hindu Law which have been brought to our notice is there any rule declaring what is to be done with the interest (it can hardly be called a share) in the common property which has been acquired by a member of the family who has not survived the period of distribution. On the other hand, there are express rules declaring that the partition is to be an equal partition, subject to the qualification that those who take by representation take only the share which he, whom they respectively represent, would have taken had he survived partition."

In the present case, though the exact share to which the adopted grandson would be entitled on partition has been made the subject of argument, that point does not, strictly speaking, arise since the dispute is whether the claimant plaintiff is entitled to succeed to a participation in the joint estate at all. It is however, desirable, to save further litigation, to decide this point as it has been raised before us, and the parties, if they cannot continue to live jointly, will thus have the means of making a partition of the ancestral estate.

[CIVIL APPELLATE JURISDICTION.]

COOMAR PORESH NARAIN ROY . . . . APPELLANT;

AND

ROBERT WATSON & Co. . . . . RESPONDENTS.

1878 Dec. 17th.

No. 810 of 1878.

Enhancement—Suit for Enhancement under Act VIII of 1859—*Buildings—Notice—Act VIII* (*B.C.*) *of* 1869, *section* 14.

Plaintiff having served notice of enhancement, in terms of section 14 of the Rent Act VIII (B.C.) of 1869, of certain lands held by defendants on which reservoirs and buildings, for the purposes of a silk filature had been constructed, brought a suit for such enhancement under Act VIII of 1859. The lower Court dismissed the suit, in spite of a statement in the plaint that the suit was brought under the latter Act on the ground that the rent of the tenure was not enhanceable under the Rent Law.

Held, that the lower Court ought not to have refused to decide the suit in the form in which it was brought, but ought to have inquired as to the nature of the tenancy, whether it was held at a fixed rate or not.

Held, further, that although the suit was brought under the general law of Procedure the notice was not vitiated by the fact that the reasons assigned for the enhancement were reasons taken from the Rent Law applicable to the case of ryots possessing rights of occupancy.

APPEAL from decree of the Additional Judge of Zillah Rajshahye, reversing the decision of the Moonsiff of Baulea.

Baboo *Rash Behary Ghose*, for Appellant.

Baboo *Annoda Prosad Banerjea*, and Baboo *Bhowany Churn Dutt*, for Respondents.

The facts are sufficiently set forth in the judgment of the High Court (1), which was as follows:—

"This was a suit brought after notice to enhance the rent of certain lands held by the defendants on which buildings and reservoirs had been constructed for the purposes of a silk

(1) MORRIS and PRINSEP, *J.J.*

1878

COOMAR PORESH NARAIN ROY v. WATSON & Co.

Judgment.

filature. The plaintiff served the defendant with a notice in terms of section 14, Act VIII (B.C.) of 1869, and expressly referred to that law in the notice. He, however, brought the suit under the general law, Act VIII of 1859, and not under the special Rent Law, Act VIII (B.C.) of 1869. The lower Court, for reasons that are not very apparent, has regarded this suit as a suit under Act VIII (B.C.) of 1869, in spite of the statement in the plaint that it is brought under Act VIII of 1859. It accordingly tried the suit under the Rent Law, and then somewhat inconsistently dismissed it, deciding that "the rent of the tenure is not enhanceable under the Rent Law." The reasons assigned for this decision are, that "the holding is not a holding for agricultural purposes, and that there are no ryots of the same class with defendants in the neighbourhood, and therefore the ryots who do exist there are not persons by comparison with whose rents that of defendants' can be raised."

We think the objection taken in special appeal must prevail, viz., that the Judge ought not to have refused to decide this suit in the form in which it was laid, or have dismissed it simply because it did not harmonize with any of the provisions of the Rent Law. There are many rulings of this Court which go to show that the lands upon which buildings are erected, unless protected in some way by the conditions of their tenure, are liable to enhanced rent. In 25 W. R., 136, *In re The Collector of Monghyr* vs. *Hakim Madar Bux*, it is laid down that: "The mere fact that a building has been erected on a piece of land with the consent of the proprietor, does not give the occupant a right to hold the land perpetually at the same rate." And again in 18 W. R., 235, *In re Ranee Doorga Soonderee Dassi Bebee* vs. *Bibee Oomdutoonissa*: "The erection of a building upon the land with the consent of the landlord does not give to the occupant a right to hold the land perpetually at the same rent."

We think that in cases of this kind it is necessary for a Court to ascertain and decide on the evidence as to the origin of the tenancy and the conditions under which the tenant erected the building. In the case quoted by the Judge himself—*Brojonath Kundoo Chowdhry* vs. *Stewart*, 16 W. R., 218, and on which he lays particular stress, there was evidence which went to shew the

ce of a specific understanding or agreement according to
:he tenure was held at a fixed rate.

case must go back to the Judge for re-trial. He will
upon the evidence on the record what is the nature of the
r, and whether the tenure can be held at a fixed rate, or
ıe plaintiff claims, liable to enhancement. He will also
ine, if necessary, any other points that may arise on the
gs between the parties. We add that the Judge is mistaken
:hing particular force to the fact that the notice was in
of the Rent Act, and that special reference was made to
nt Act in it. The notice is in no way vitiated by this
stance. It specifies clearly the terms upon which, and
e from which, the plaintiff demands increased rent from
endants in respect of the different classes of lands held
n. It is no bar to the notice that the reasons assigned
enhancement are reasons taken from the Rent Law, appli-
ɔ the case of ryots possessing a right of occupancy. Costs
ide the event.

[ORIGINAL CIVIL JURISDICTION.]

1878
Dec. 12th

No. 676 of 1877

KIRTEE CHUNDER MITTER . . . . . PLAINTIFF;

AND

G. M. STRUTHERS AND OTHERS . . . . . DEFENDANTS.

Contract Act (IX of 1872), section 44—Release of one of several partners

Under section 44 of the Contract Act, a release of one of several partners, jointly liable upon a contract, does not discharge from liability the other partners who are not parties to the agreement by which such release is granted.

THIS was a suit brought against the defendant G. M. Struthers and the Official Assignee, as assignee of the estate of F. Schiller, E. C. Vancutsem and A. B. Struthers, formerly partners of the first-named defendant in the firm of Messrs. Borrodaile, Schiller & Co., to recover the price of certain jute sold and delivered under contracts entered into between the plaintiff and the firm of Messrs. Borrodaile, Schiller & Co., in the months of May and July 1877. There was also a claim for damages for non-acceptance of delivery of jute under the same contracts, but this claim was ultimately abandoned.

At the time the contracts were entered into, the members of the firm of Borrodaile, Schiller & Co. were G. M. Struthers, F. Schiller, E. C. Vancutsem and A. B. Struthers. On the 13th August 1877, G. M. Struthers retired from the firm, and subsequently, on the 20th November, the remaining members of the partnership became insolvent.

The suit was instituted on the 29th November 1877. The Official Assignee obtained leave to defend.

On the 29th July 1878, the defendant, G. M. Struthers, affected a compromise with the plaintiff upon the terms mentioned in a receipt, of which the following is a copy:—

CALCUTTA, 19*th July* 1878.

"Received from Mr. G. M. Struthers the sum of Rs. 9,500, (nine thousand and five hundred) by a cheque, No. D. 29603, on the

Agra Bank, Limited, in full satisfaction of all claims upon him as an individual, and as a partner in the late firm of Messrs. Borrodaile, Schiller & Co., and we hereby undertake to immediately withdraw the suit against him and others in the High Court, instituted by Kirtee Chunder Mitter, in connection with certain sales of jute by him under the style of P. N. Mitter & Co., to the late firm of Messrs. Borrodaile, Schiller & Co., which he, Mr. Struthers, was a partner in the latter firm."

(Signed) P. N. MITTER.
KIRTEE CHUNDER MITTER.

Upon this compromise coming to the knowledge of the Official Assignee, he obtained leave to file a further written statement, in which he objected that the receipt operated as a release of all the partners of the firm of Messrs. Borrodaile, Schiller & Co.

Branson, for the Plaintiff.
Trevelyan, for G. M. Struthers.
Agnew and *Henderson*, for the Official Assignee.

Branson.—The receipt given to G. M. Struthers operates as a discharge of him alone. The 44th section of the contract says that a release of one of two or more joint promisors by the promisee does not discharge the other joint promisor or promisors. From the document it clearly appears that the money paid was in satisfaction of all claims against G. M. Struthers only. The words "withdraw the suit against G. M. Struthers and others" are merely descriptive and do not indicate any intention to withdraw the suit as against the partners who were not parties to the compromise.

Agnew.—The case is governed by the English authorities. The Contract Act has not altered the English rule of law as to a release of one partner by a creditor of the partnership. In this case no remedies are reserved by the instrument against the other members of the firm. All that the instrument does is to mention the receipt of the money and the agreement to withdraw the suit against G. M. Struthers and others."

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KIETER CHUNDER MITTER v. STRUTHERS.

Judgment.

[*The Court.*—Whatever the English law may be, we are bound here by the Contract Act.]

The chapter of the Contract Act in which section 44 is included relates merely to the performance of contracts and the persons who are to perform them. There is a clear distinction between a release from the performance of some particular thing under a contract, and a release from a liability which has arisen from a breach of a contract already entered upon. In the present case the release is not a release from the performance of anything to be done under the contract, but a release from an existing liability arising out of a breach of a contract already entered upon. Section 44 has, therefore, no application.

Branson (in reply) :—

The meaning of section 44 is, that if several persons liable upon a contract fail to perform the conditions of that contract, there is a right of suit against them, and each or all of them may be called upon for performance: to one a release may be given without discharging the others from their liability.

WILSON, J.

WILSON, *J.* :—

This action is for debt for the price of goods sold and for damages for non-acceptance. The admitted facts show that after action brought the plaintiff entered into an arrangement in writing with one of the defendants, G. M. Struthers. The form of the receipt which expresses the agreement is as follows:— "Received from G. M. Struthers the sum of Rs. 9,500 in full discharge of all claims upon him as an individual and as a partner in the late firm of Borrodaile, Schiller & Co., and we hereby undertake to immediately withdraw the suit against him and others." Whatever the English law would have been as to the effect of the document, we are governed here by the Contract Act. It is a receipt in satisfaction, from one of several persons jointly liable for debt and damages. Section 44 says: "Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors." I think that section applies. It is said that the section applies only to a release to a man from his promise before breach and not to a discharge after breach. That

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I think is too narrow a construction. I think the meaning general —that the release to one of several contractors does not discharge the co-contractors. I ought to say a word as to the latter part of the document by which the plaintiffs undertook to withdraw this action described as one "against him, (that is, G. M. Struthers) and others." It is admitted by the other partners that they were no parties to the agreement expressed in this receipt, and that there was no contract with them to withdraw from the suit as against them. There is, therefore, no breach of faith in the continuance of the action against them.

[CIVIL APPELLATE JURISDICTION.]

DOORGA RAM PAUL AND OTHERS, (PLAINTIFFS) APPELLANTS; AND KALLY KRISTO PAUL AND OTHERS . . . . . (DEFENDANTS) RESPONDENTS.

July 8th.

No. 1644 of 1877.

Res-Judicata—Unsuccessful suit for damages for trespass followed by suit to establish title to lands—Act VIII of 1859, *section* 2.

A, alleging himself the owner of a certain garden, brought a suit for damages against B and C for forcibly carrying off fruit grown in such garden. In this suit, the question whether A was exclusively in possession of the garden, was incidentally raised and decided against A. Thereupon A, who in the meantime had been ousted from possession, brought a subsequent suit in which B and C, together with others, were co-defendants, in which he claimed an undivided share in the same garden. *Held*, that under the circumstances, the doctrine of *res-judicata* did not apply, and that such suit was maintainable.

SPECIAL APPEAL against a decree of the Judge of Zillah Dacca, reversing the decree of the Moonsiff of Kallygunge.

Baboo *Doorga Mohun Das*, for Appellant.

Baboo *Protab Chunder Mozumdar*, for Respondent.

The facts of the case appear sufficiently from the judgment of the Court (1) which was delivered by

JACKSON, *J.*:—

JACKSON, *J.*

The plaintiffs in this case claimed to be entitled to an indivi-

(1) JACKSON and TOTTENHAM, *J.J.*

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DOORGA RAM PAUL v. KALLY KRISTO PAUL.

Judgment.

JACKSON, J.

dual share in certain land on which there stood fruit trees and other things. It appears that, on a former occasion, the fifth and sixth defendants committed trespass upon the land, and took away certain fruits from the trees growing on the spot. The suit which the plaintiffs brought for damages upon that occasion was dismissed, and it seems that an incidental question of title was raised and so far decided against them. They have now brought this suit formally for recovery of possession of the land from which they say they have been dispossessed by repeated acts of the defendants, who they say are in league with others, who are their co-sharers.

The Moonsiff gave the plaintiffs a decree. On appeal, the District Judge was of opinion that the matter at issue in the present suit was really *res-judicata* by reason of the previous decision in the suit for damages. Accordingly, without going into the merits of the case, he dismissed the suit. He says : "On the ground, therefore, that the matter now in issue has been substantially decided in another suit between the same parties litigating under the same title, I reverse the Moonsiff's decision with all costs and interests." No doubt, if in a suit framed for that purpose, and brought in a Court having competent jurisdiction, the question of title had been formally raised and determined against the plaintiffs, that would be a binding decision, but the cause of action in this suit is not the same, nor was the Court trying the same competent to determine finally the question of title. That question was incidentally raised for the purpose of ascertaining whether the plaintiffs were entitled to damages. In fact, in the opinion of the Moonsiff, the question of title was not gone into in that case at all. However that may be, the present is a suit upon an entirely different cause of action, and for the express purpose of determining the title of the plaintiff. The Judge was wrong, we think, in holding that the matter was *res-judicata*. The case must, therefore, go back to him for trial on the merits. The appellant will get the costs of this appeal.

[CRIMINAL JURISDICTION.]

RAJAH KUMUD NARAIN BHOOP . PETITIONER;

AND

MOHIM CHUNDER AND OTHERS . . OPPOSITE PARTIES.

1878 *Dec. 18th.*

No. 160 *of* 1878.

Notice—Criminal Procedure Code, section 530—Jurisdiction—Intervenor.

Notice under section 530 of the Code of Criminal Procedure is a specific notice to the individuals interested in the dispute in consequence of which the proceedings have arisen, and is not a general citation to the public.

There is no provision in that Code by which an intervenor can come in and claim possession of the property which is already the subject of proceedings under section 530 in connection with a dispute between other persons—unless the Magistrate shall be satisfied of the existence of a dispute between such intervenor and some one else likely to give rise to a breach of the peace and have recorded a fresh preliminary proceeding to that effect.

CRIMINAL MOTION to set aside an order passed by the Extra Assistant Commissioner of Goalpara.

Baboo *Hem Chunder Banerjee*, and Baboo *Isshur Chunder Chuckerbutty*, for Petitioner.

Baboo *Gooroo Dass Banerjee* and Baboo *Umakally Mookerjee*, for Opposite Parties.

The facts are sufficiently set forth in the following judgment of the High Court (1), which was delivered by

AINSLIE, *J.*:—

AINSLIE, *J.*

On the 23rd February 1878, the Extra Assistant Commissioner of Goalpara from proceedings before him was led to the belief that there was a likelihood of a breach of the peace in consequence of a dispute about certain lands between Rajah Kumud Narain Bhoop on one side and Puddo Kishore Burna on the other side. He consequently directed that proceedings should be

(1) AINSLIE and BROUGHTON, *J.J.*

1878

RAJAH KUMUD NARAIN BHOOP v. MOHIM CHUNDER.

Judgment.

AINSLIE, J.

held under section 530 of the Criminal Procedure Code, and recording a proceeding reciting the existence of this dispute, he caused notice to be given to the parties above-named.

These persons in the end came to an amicable settlement of their dispute; but in the meantime shortly before this settlement was effected, another party, Gopi Nath Chuckerbutty, came in on 9th May, and put forward a claim to the possession of a portion of the land covered by the Magistrate's notice.

Eventually an order was made by the Magistrate on 24th June, declaring Gopi Nath to be the party in possession.

The Rajah has applied to this Court to quash this order, as made without jurisdiction, and the only question we have to consider is this one of jurisdiction.

In many cases it has been held that a proceeding, such as is required by section 530, is a necessary preliminary, and Mr. Justice NORMAN in the case of *Kashi Kishore Roy* vs. *Tarini Kant Lahori*, (3 B. L. R., Cr., 76), points out that one object of this is to prevent a Magistrate from rashly interfering with questions of possession which should ordinarily be decided by the Civil Courts, except in cases where a breach of the peace is apprehended, and where it is necessary for the preservation of public order that steps be taken in the Criminal Court.

The power given to a Magistrate to make a binding declaration as to the possession of property is an exceptional one, and is conferred in a chapter (XL) forming a portion of part XI of the Code, which is entitled "Preventive Jurisdiction of Magistrates." Section 530 limits the exercise of this power to cases in which the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists. And it is this likelihood, the consequent necessity for immediate action, which alone warrants action by the Magistrate under chapter XL, and the Magistrate is obliged to certify the grounds on which he believes in the existence of the likelihood of a breach of the peace by recording them in the proceeding. The practice under section 318 of the Code of 1861 and 530 of the Criminal Procedure Code, has, as we believe, been uniformly to issue notice to certain parties indicated in the information on which the Magistrate's action is based. The law

not provide for a public notice or proclamation calling upon all parties concerned to attend the Magistrate's Court. It is true that by the words, "shall call upon all parties concerned in such dispute," no particular mode of giving notice is expressly prescribed, but nevertheless we are of opinion that the language of the section indicates that the notice shall be to known individuals. The Magistrate must be satisfied that there is a dispute serious enough to be likely to lead to a breach of the peace. Although the explanation in no way restricts him in reference to the character of the information upon which he proposes to take action, yet it is obvious that the information must at least indicate the disputing parties. If the Magistrate is unable to point to any one or more persons on one side as said to be engaged in a dispute, with one or more persons on the other, it is difficult to understand how he can reasonably declare himself satisfied of the existence of a dispute, and it is only when satisfied of the existence of a dispute that he is to call upon all parties concerned in such dispute. This clearly shows that the call is addressed to individuals and not to the public.

Baboo Gooroo Dass Banerjee relied upon the words "shall call upon *all* persons concerned" as showing that the law contemplated something in the way of a general citation, and supported this view by referring to the last words of the section, "forbidding *all* disturbance of possession until such time," but in the absence of any specific declaration that the procedure is to be by a public citation, we think that the latter words can only be taken as applying to the parties of whose dispute the Magistrate has knowledge.

This view is confirmed by the language of section 531: "If such Magistrate decides that *neither* of *the* parties is in possession or is unable, &c." Had it been intended that the declaration should operate as universally binding the words would have been "that no party is in possession." The section, as it stands, shows that the Magistrate's order is to be directed to those persons actually before him (or who, having been called upon, have failed to appear.)

In this view of the law it seems to us that the proceedings taken after the compromise were not properly taken. There is no provisions in the Criminal Procedure Code for allowing an "inter-

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RAJAH KUMUD NARAIN BHOOP v. MOHIM CHUNDER.

Judgment.

AINSLIE, J.

venor" to come in in the middle of proceedings held by a Magistrate under section 530. As to such third party, the Magistrate has "*ex hypothesi*" no information of any dispute likely to lead to a breach of the peace between him and any one else, and, therefore, the only ground upon which he can enter upon an enquiry as to the possession of such third party at the date of the commencement of the pending proceedings is wanting. As to any thing of later date, he may take such steps in a separate proceeding as circumstances call for and the law allows.

The order of the Extra Assistant Commissioner, made on the 24th June 1878, in favor of Gopi Nath Chuckerbutty, is set aside, and the whole proceedings as regards him are quashed. As regards the original parties before the Magistrate, no order is requisite, inasmuch as the dispute between them is at an end.

[CIVIL APPELLATE JURISDICTION.]

Dec. 20th.

No. 1904 of 1877.

HEERALAL MUKHOPADHYA AND ANOTHER . . . . . (DEFENDANTS), APPELLANTS;

AND

ROY DHUNPUT SINGH BAHADUR . . . . . (PLAINTIFF), RESPONDENT.

Expired Decree—Instalment Bond by Judgment-debtor—Consideration—Contract Act, section 25.

In November 1864, plaintiff instituted proceedings in execution of a decree obtained by him in 1859. While such proceedings were pending, no question of limitation having been raised, the judgment-debtor filed in Court a deed of compromise, by which she admitted a certain sum to be due and agreed to pay off the debt by instalments, there being a condition in the deed that on default being made the whole amount due should be recovered by execution of the decree. Default was made, and the plaintiff attempted, in terms of the compromise, to execute the decree against the representatives of the judgment-debtor, but it was held this suit in execution was barred, as the decree had been dead at the time of the compromise and could not be revived by any agreement between the parties. The plaintiff thereupon brought a suit upon the compromise as a distinct contract, to recover the balance due thereunder. *Held*, that, although the decree was barred at the time of the compro-

mise, the principle laid down by section 25 of the Contract Act was not new in India, and that the compromise was a valid contract and enforceable by suit.

SPECIAL APPEAL from a decree passed by the Judge of Moorshedabad, reversing a decree of the Subordinate Judge of that district.

This was a suit brought by a decree-holder, the present plaintiff, against the representatives of a deceased judgment-debtor, to recover the balance due upon a compromise or kistbundi, executed by the late judgment-debtor under the following circumstances:—In 1858 the present plaintiff obtained a decree against Chitcomary Bibee. On the 21st of November 1864, he attempted to execute his decree. While the execution proceedings were pending, his judgment-debtor being unable to pay the whole amount due under the decree, entered into a compromise or kistbundi, by which she agreed to pay Rs. 1,100 at once out of a sum of Rs. 4,945-9-3, which she admitted to be due, and the remainder by instalments of Rs. 250 in the months of Bysack and Kartick of each year, with interest at 13 per cent.; and she further agreed that should default be made in the payment of any of the instalments, the money due by her should be recovered by execution of the decree.

She filed the compromise in Court, and the execution proceedings were struck off, no question of limitation having arisen. Until October 1873, the terms of the compromise were acted upon and due payments made thereunder. Her representatives, the present defendants, having then made default, the present plaintiff attempted under the compromise to execute his decree, but unsuccessfully, for the High Court on appeal held that the decree was dead at the time of the compromise, and that being so, it could not be revived by any arrangement between the parties. (The decision of the High Court is reported in 24 W. R., [illegible].)

Upon this the present suit was brought on the basis of the compromise as a distinct and separate contract. The Court of First Instance dismissed the suit on the ground that the contract was void for want of consideration.

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HEERALAL MUKHOPADHYA v. ROY DHUNPUT SINGH BAHADUR.

Judgment.

The lower Appellate Court set this order aside and allowed the claims. The defendant then appealed specially to the High Court.

Evans, (with him Baboo *Nullit Chunder Sen*, and Baboo *Mutty Lall Mokerjee*), for the Appellants.

Paul (Advocate-General) (with him Baboo *Sreenath Dass*, and Baboo *Guru Dass Banerjee*) for the Respondent.

The judgment of the High Court (1) was as follows :—

This case is practically in continuation of the litigation, of which the last stage is reported in 24 W. R., 282. The present plaintiff obtained a decree against one Chitcomary for a certain sum of money, and in the course of executing it a petition, to which the plaintiff decree-holder assented, was presented on behalf of the debtor, acknowledging a certain amount to be due from her, and promising to pay it off by instalments. Money was paid under this agreement, but Chitcomary having died, execution of the decree for the balance outstanding was taken out against the present defendants as her representatives. Objection was raised, and finally allowed by a Division Bench of this Court (see 24 W. R., 282), that execution could not proceed as it was barred by limitation, and the agreement for payment by instalments could not be substituted for that decree or extend the ordinary term of limitation. The plaintiff has now brought the present suit to recover the balance due on the agreement entered into by Chitcomary as specified in the petition presented by her.

The Subordinate Judge dismissed the suit, holding that the consideration of the kistbundi was the sum due under the decree, execution of which was at that time barred by limitation; and that as the debt covered by that agreement could not be legally recovered, there was no valid legal consideration for supporting the kistbundi.

In appeal this order was set aside, the claim being allowed, and the defendants have now brought this special appeal.

(1) PRINSEP and TOTTENHAM, *J.J.*

Mr. Evans, for the special appellants, contends that the fact that there has been no consideration has already been decided by the judgment reported in 24 W. R., 282, but we are of opinion that this matter was not, and could not, be then decided, inasmuch as in that stage of this case the only question before the Court was, whether execution could proceed with respect to the original decree or on the kistbundi in substitution of that decree, and in accordance with precedents of this Court, it was held that execution of the decree itself was barred by limitation, and the kistbundi could not operate as a revival of that decree so as to make it capable of being executed. There may be expressions in the course of the judgment that intimate the absence of consideration, but that was not properly before the Court, and cannot preclude our determination of the point in the present case.

As regards the petition made on behalf of the debtor, now represented by the defendants in the proceedings in execution of the decree held by the plaintiff, we are of opinion that it may be regarded as embodying the terms of an agreement entered into between the parties, such as has been found to have been entered into, whereby in modification of the terms of the decree which permitted immediate realisation of the judgment-debt, it was agreed that payment should be made by instalments. In consideration for this, the decree-holder consented to abstain from enforcing his right to immediate payment by executing his decree. That he could and would have done so is clear from the action of the Court. In giving effect to this agreement, more than one payment of the instalments has been made by the original debtor and the defendants; and it is only on default made by the latter that objection has been raised. The only objection that we need consider is, whether there was a good consideration for this agreement, since it is contended that inasmuch as the consideration depended upon the right to execute the decree, and it has been held that that decree was at that time inoperative, there is an absence of all valid legal consideration.

We are of opinion that, though this appears to have been the finding of the Court when the decree was afterwards executed in default of payment of some of the instalments, when that agree-

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ment was made the decree was capable of being executed under the law, as it was then administered; it was by the parties as well as by the Court of execution treated as a good decree; and we should be disinclined to hold that what was then a valid agreement has since become null and void.

But we agree with the learned Advocate-General that the principle which is expressed in section 25, clause 3, of the Contract Act of 1872, is not altogether new to our Courts, and that under it this kistbundi would be valid without any consideration. So that we have no difficulty in affirming the decree of the lower Appellate Court and dismissing this special appeal with costs.

[CIVIL REFERENCE.]

Dec. 10th.

IN THE MATTER OF CHANDRA KANTA BISWAS, PETITIONER.

Small Cause Court, Mofussil—Act XI of 1865, section 20—Execution of Decree—Transfer of Decree to another Court.

Under section 20 of Act XI of 1865, a Court of Small Causes may transfer a decree for execution to another Court, not only when there has been a sale of such moveables of the debtor as the judgment-creditor has been able to discover, and the proceeds of such sale have not been sufficient to satisfy the decree, but also when no sale has taken place at all, and the decree remains unsatisfied by reason of there being no moveable property of the judgment-debtor which can be found within the jurisdiction capable of being sold.

REFERENCE under section 617 of Act X of 1877, from the Judge of the Court of Small Causes at Pubna.

In this case a decree-holder applied to the Judge of the Court of Small Causes at Pubna for a certificate to enable him to execute his decree, which had been obtained in that Court, within the jurisdiction of the Court of the Moonsiff of Khoostea. It appeared from the previous proceedings that the decree-holder had been unsuccessful in laying hold of any moveable property belonging to the judgment-debtor, and that the proceedings had been struck off without any satisfaction of the decree being obtained.

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In re CHANDRA KANTA BISWAS.

Judgment.

The Judge was of opinion that, inasmuch as there had been o sale of the moveable property of the judgment-debtor within he jurisdiction of the Court, he was unable, under section 20 of he Small Cause Courts (Mofussil) Act (XI of 1865), to grant he certificate prayed for. That section provides that "In the xecution of a decree under this Act if after the sale of moveable roperty of the judgment-debtor any portion of a judgment-debt hall remain due and the holder of the judgment desires to issue xecution upon any immoveable property belonging to the judgment-debtor, the Court, on the application of the holder of such udgment, shall grant him a copy of the judgment and a certificate of any sum remaining due under it, &c."

The application of the decree-holder was, therefore, rejected coningent upon the decision of the High Court upon the following uestions:—First, whether the sale of the moveable property hould be viewed as a condition precedent to the judgment-creditor btaining a certificate under section 20 of Act XI of 1865; and, econdly, if so, whether the judgment-creditor is entitled to any nd what relief in the matter of his unsatisfied decree.

The following judgment of the High Court (1) was delivered

RINSEP, *J.*:—

PRINSEP, *J.*

The Judge of the Small Cause Court of Pubna has referred us the determination of the question "whether the sale of oveable property belonging to a judgment-debtor should be ewed as a condition precedent to the judgment-creditor obtaing a certificate under section 20, Act XI of 1865." He has pressed his own opinion in the affirmative, and has refused to ant a certificate to enforce execution of a decree beyond his risdiction, because the decree-holder has been unable to find nd sell any moveable property of the judgment-debtor.

We think that, though the opinion expressed by the Judge is voured by the strict letter of the law, yet the terms of section are not inconsistent with, and may reasonably bear a more beral construction. The law provides that a decree of a Small

(1) MORRIS and PRINSEP, *J.J.*

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PRINSEP, *J.*

Cause Court should be satisfied in the first instance by the sale of the moveable property of the judgment-debtor within the jurisdiction of the Court that passed the decree, but that in the event of such sale of moveable property failing in its object, recourse should be had to sale of the immoveable property of the judgment-debtor, outside the jurisdiction. What it appears to contemplate is, that the moveable property of the judgment-debtor within the jurisdiction should first be attached and sold, and then, but not till then, his immoveable property outside the jurisdiction. We think, therefore, that if the Court is satisfied that every effort has been made to discover and sell the moveables, it may transfer the decree for execution to another Court, not only when the sale of such moveables as the judgment-creditor has been able to discover is insufficient to satisfy the decree, but also when no sale has taken place at all, and the decree remains unsatisfied by reason of there being no moveable property of the judgment-debtor which can be found within the jurisdiction capable of being sold.

[PRIVY COUNCIL.]

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Dec. 6th.

CHAND SAHOO AND OTHERS . . APPELLANTS;

AND

IABEEL CHAND . . . . . RESPONDENT.

CHAND SAHOO AND OTHERS . . APPELLANTS;

AND

SHESHUR DYAL AND OTHERS . . RESPONDENTS.

ıle—Arrears of Rent—Act VIII (B.C.) of 1869, *section* 59—*Act VIII of* 1859—*Right, Title and Interest.*

his three sisters were joint owners of a certain mouzah, the holding 7 annas 7 pie and 4 krants, and the latter together 4 pie 16 krants of the 16 annas of the estate. In execution of obtained against A, his right, title and interest in the mouzah to B. The zemindar then brought a suit under Act VIII (B.C.) against A, for arrears of rent in respect of the mouzah, and a decree, in execution of which he applied not for a sale of re as he might have done under section 5 9 of that Act, but for nent and sale of the judgment-debtor's property." Upon this on orders for sale were issued under Act VIII of 1859. The fication was headed "under section 246 of Act VIII of 1859," fied the sale of the rights and interests only of the judgment- At this sale C became the purchaser, and was put in possession ɔuzah. Thereupon B, the purchaser at the first execution sale, ird person D, who had meanwhile purchased the share of A's ued C for possession.

that B and D were entitled to possession, for that C had nothing under his purchase.

S from a decision of the High Court of Judicature at ım in Bengal.

athoon, for Appellants.

ɔr Respondents.

of the case are sufficiently set forth in the judgment rdships (1) of the Privy Council, which is as follows :—

two cases the property in respect of which the actions

. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

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were brought was the mouzah called Mouzah "Inglis" in the district of Shahabad. That mouzah, many years ago, was granted to Gooran Khan, an invalided havildar, under the provisions of the 23rd section of Regulation XLIII of 1793. By virtue of that section Gooran Khan held the property free of revenue and free of rent during his life as a jageer, but upon his death the property became liable to be assessed, and by virtue of the section, to which allusion has been made, the assessment would be in the nature of rent payable to the zemindar of the estate in which the mouzah was situate. The zemindar in question was the Maharajah of Domraon. Upon the death of Gooran Khan, Bachoo Khan, his son and heir, came in as his representative, and the property then being liable to assessment, he entered into a settlement with the Maharajah in September 1827, upon which a rent was reserved to the Maharajah in respect of the tenure. Bachoo Khan died in October 1860, a period within twelve years before the commencement of the suit. He left a widow, Nazirun, and a son, Gooder Khan, and three daughters, Nazeerun, Saheebun, and Peerzadi. The son was entitled to a share of five annas seven pies and four krants, and the three daughters were entitled to shares amounting together to eight annas four pies and sixteen krants of the mouzah. The widow appears to have given up her share altogether, and it may be assumed for the purpose of this decision that the son took the widow's share, which, together with his own share of five annas seven pies and four krants, gave him an interest to the extent of seven annas seven pies and four krants. That interest added to that of the daughters' makes up the whole amount of the sixteen annas of the mouzah.

After the death of Bachoo Khan, his son, Gooder Khan, was sued in respect of a loan which had been made to Bachoo Khan. Proceedings went on, and a decree was ultimately obtained under arbitration against Gooder Khan. Gooder Khan, in order to raise money to satisfy that decree, borrowed a sum of money from Ram Jeawan Singh. Gooder Khan was sued by Ram Jeawan Singh in respect of the money so borrowed; and, although Gooder had mortgaged a twelve annas share of the mouzah to Ram Jeawan as a security for the loan, the action against Gooder

.n was treated merely as one for an ordinary debt, and Ram van obtained a decree against him for the money due, and rest. Upon that an execution was issued. Bisheshur pur-ed under that decree, not the twelve annas share, which had . mortgaged, but merely the right and interest of Gooder n, which, as already stated, amounted to seven annas seven and four krants. The Maharajah also brought a suit against der Khan for three years' rent, which was due under the ement made with him. That suit was brought under the isions of Act VIII of 1869 of the Government of Bengal. hat suit it was ordered that an *ex-parte* decree be passed in r of the plaintiff; that the plaintiff do recover the amount claim-with costs, and interest at the rate of six per cent. per annum o the day of realization from the defendant. The Maharajah eeded to execute that decree against Gooder Khan. On the March 1872 he applied to have it executed. He gave the es of the parties, and then he stated what redress he sought the Court. He stated under that head, "the attachment sale of the property belonging to the judgment-debtor," is, the property belonging to Gooder Khan. The petition in this way:—"The decretal money due to your petitioner ayable by the judgment-debtor under a decree mentioned re. Your petitioner, therefore, begs to file this petition along an inventory of the property belonging to the judgment-or, and prays that by attachment and sale of the judgment-or's property, the decretal amount, together with costs and re interest up to day of realization, be ordered to be recover-rom the judgment-debtor." An inventory was attached to petition in the following words:—"Inventory of the invalid s, being the kasht (cultivation) of the judgment-debtor, ited in Mouzah Rampore, Pergunnah Bhojepore, for the very of the arrears of rent whereof the present decree is d, amounting to 120 beegahs." It, therefore, appears clear the application was merely that by attachment and sale of judgment-debtor's property, the decretal amount might be ed. By virtue of the 59th section of the said Act VIII of , the Maharajah, if he had pleased, was authorized to apply e sale of the tenure. By that section it is enacted that,

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"whenever a decree shall be passed for an arrear of rent due in respect of an under-tenure, which by the title deeds or the custom of the country is transferable by sale, and the judgment-creditor shall make application for the attachment and sale of such under-tenure, the Court shall, so soon as such under-tenure shall have been ordered to be sold, cause to be hung up in some conspicuous part of the building in which such Court sits, and of the buildings in which the Collector and Judge of the district within which the land comprised in such under-tenure is situate, and to be fixed on some conspicuous place on such land, and on some conspicuous place in the town or village in or nearest to which such land is situated, a notice for the sale of such under-tenure on some fixed day, not less than twenty days from the hanging up of such notice in such Court." By section 34 of the same Act it is enacted that, "save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the Code of Civil Procedure passed by the Governor-General in Council, being Act VIII of 1859, and by such further and other enactments of the Governor-General in Council in relation to Civil Procedure as now are or from time to time may be in force; and all the provisions of the said Act and of such other enactments shall apply to such suits." It appears, therefore, that although the Maharajah might, if he had pleased, have applied to sell the tenure in execution of his decree, he had also a power to proceed against the property of the defendant. It has already been shown what the application of the Maharajah was. He asked that the decree might be realized by the sale of the property of the judgment-debtor. Upon that application the Moonsiff issued a perwannah described as a "perwannah for execution of a decree under section 233 to section 238, Act VIII of 1859." If he had considered that the application was an application to sell the tenure under section 59 of Act VIII of 1869, it would have been described as a procedure under that section, and not under the sections of the Civil Procedure Code, to which the Moonsiff refers in his perwannah. The perwannah issued to the officer was as follows:—"Pursuant to an order of this day, you are required to attach the under-

mentioned properties under the provisions of Act VIII of 1859, as they may be pointed out by the decree-holder, and submit the inventory of the property attached, with your report, within a week." Then he describes the property: "Invalid land held in cultivation," and he gives the boundaries of the land. So that the perwannah was merely to attach that property under the provisions of Act VIII of 1859. Now it is clear that in attaching the property of a judgment-debtor, whether in an under-tenure or in any ordinary leasehold interest, under Act VIII of 1859, you can only attach and sell the right, title, and interest of the judgment-debtor, but if you proceed to sell a tenure under section 59 of Act VIII of 1869, then you sell the tenure; and by virtue of section 66 of the same Act, the purchaser under the provisions of sections 59 and 60 of the Act acquires it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement. So that if this tenure had been sold under the provisions of section 59, the sale would have got rid of all under-tenures, and the purchaser would have been entitled to the whole interest in the tenure, free from all incumbrances, in the same way as if the tenure had been sold under the provisions of the law for the sale of an estate for the arrears of Government revenue. Having issued that perwannah to the officer to execute the decree, notice of the intended sale was given. That will be found at page 71 of the record. It is headed "Sale Notification," not under section 59 of Act VIII of 1869, but "a sale notification under section 246 of Act VIII of 1859," and it proceeds: "Auction sale of the rights and interests in the undermentioned properties for the realisation of the amount covered by the decree." And then it states: "Notice is hereby given to the public that Sahib Ram filed, on the 31st March 1872, an inventory of the undermentioned property, praying for their auction sale for the realisation of the decretal money; therefore this proclamation is issued for the information of the public, to the effect that on Friday, July 19th, 1872, A. D., corresponding with the 28th Assar 1279 Fusli, the auction sale of whatever rights and interests Gooder Khan, the

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judgment-debtor, has in the property detailed below, will be commenced at noon in the place where the property is situated in Pergunnah Bhojepore, Zillah Shahabad. If any one wishes to purchase the said rights, he ought to appear at the aforesaid time and place, either personally or through his mookhtar, and purchase it. The rights and interests of other persons in the said property will not be sold by auction besides that of the judgment-debtor." So that there was an express notice that under the sale in execution of the decree only the rights and interests of the debtor were to be sold; and it was also expressly pointed out that the rights and interests of other persons in the said property, other than those of the judgment-debtor, would not be sold. Under that notification Doolar Chand and others, the defendants in the two suits out of which this appeal arises, purchased. The sale to them was confirmed, and they were put into possession and obtained a certificate of sale. The certificate which they obtained was as follows:—"On a petition having been filed for execution of a decree of the Civil Court passed by the Moonsiff of Buxar, Zillah Shahabad, dated the 2nd December 1871, A.D., in suit No. 16, against the judgment-debtor, and for the sale of his property, a sale notification was under the order of this Court issued, and the property sold at auction on the 25th July 1872. Whatever rights and interests the judgment-debtor had in the said property were purchased by Doolar Chand," and so on. Those are the defendants. "Hence, this certificate being made over to Doolar Chand, Baijnath, and Ram Saran Sahoo, &c., the auction purchasers, it is proclaimed that whatever rights and interests the said judgment-debtor has in the property aforesaid, have ceased to exist from the 25th July 1872, the date of the auction sale, and become vested in the auction purchasers, Doolar Chand, Baijnath Sahoo, and Ram Sarun Sahoo." Nothing then can be clearer than that both the perwannah and the notice of sale, as well as the certificate, gave express notice to the purchasers that nothing would be sold, and that nothing was sold to them save and except the rights and interests of the judgment-debtor.

Here it may be observed that if the notice of sale had stated that the tenure was to be sold under the provisions of Act VIII of 1869, the three sisters of Gooder Khan might have protected the

ing in accordance with the provisions the Maharajah. The purchasers hav- ion, Chabeel Chand, one of the plaintiffs, ts of the three sisters. They were entitled pies and sixteen krants in this tenure, and the l Chand, purchased that right, and he contended is purchase he was entitled to recover from the auction s, under the Maharajah's decree, the eight annas four pies teen krants which he had purchased from the sisters. Lalla eshur Dyal, who had purchased under the decree of Ram ran Singh, also claimed that he was entitled to recover posses- of what he had purchased under Ram Jeawan Singh's decree, that he had purchased under Ram Jeawan Singh's decree, the t, title and interest of Gooder Khan previously to the sale r the Maharajah's decree. The Judges of the lower ts dismissed the claims, both of Bisheshur and Chabeel d. But the High Court reversed those decisions, upon the nd that Doolar Chand and others had purchased under the arajah's decree only the right, title, and interest of Gooder n. If they purchased the tenure they would have been en- l to retain possession, and the plaintiffs would have failed eir suit. On the other hand, if they purchased merely the t, title, and interest of Gooder Khan, then in the one case beel was entitled to recover the eight annas four pies and en krants share of the mouzah which he had purchased the sisters, and Bisheshur was entitled to recover the other ion of the estate which he had purchased as the right, title, interest of Gooder Khan. It has already been shown what nature of the sale in execution of the Maharajah's decree , and their Lordships think that the High Court were right he conclusion at which they arrived, that Doolar Chand and rs, the defendants in the suits, had purchased merely the t, title, and interest of Gooder Khan, and not the whole re free from all incumbrances and the rights of others who interested therein.

ader these circumstances, they are of opinion that the High t was right in holding that Chabeel Chand was entitled to r the eight annas four pies and sixteen krants, and that

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ment was made the decree was capable of being executed under the law, as it was then administered; it was by the parties as well as by the Court of execution treated as a good decree; and we should be disinclined to hold that what was then a valid agreement has since become null and void.

But we agree with the learned Advocate-General that the principle which is expressed in section 25, clause 3, of the Contract Act of 1872, is not altogether new to our Courts, and that under it this kistbundi would be valid without any consideration. So that we have no difficulty in affirming the decree of the lower Appellate Court and dismissing this special appeal with costs.

[CIVIL REFERENCE.]

Dec. 10th. IN THE MATTER OF CHANDRA KANTA BISWAS, PETITIONER.

Small Cause Court, Mofussil—Act XI of 1865, section 20—Execution of Decree—Transfer of Decree to another Court.

Under section 20 of Act XI of 1865, a Court of Small Causes may transfer a decree for execution to another Court, not only when there has been a sale of such moveables of the debtor as the judgment-creditor has been able to discover, and the proceeds of such sale have not been sufficient to satisfy the decree, but also when no sale has taken place at all, and the decree remains unsatisfied by reason of there being no moveable property of the judgment-debtor which can be found within the jurisdiction capable of being sold.

REFERENCE under section 617 of Act X of 1877, from the Judge of the Court of Small Causes at Pubna.

In this case a decree-holder applied to the Judge of the Court of Small Causes at Pubna for a certificate to enable him to execute his decree, which had been obtained in that Court, within the jurisdiction of the Court of the Moonsiff of Khoostea. It appeared from the previous proceedings that the decree-holder had been unsuccessful in laying hold of any moveable property belonging to the judgment-debtor, and that the proceedings had been struck off without any satisfaction of the decree being obtained.

[CIVIL APPELLATE JURISDICTION.]

RAJENDRO NARAIN NEOGI AND ANOTHER . PLAINTIFFS;

AND

RAJA KUMUD NARAIN BHUP . . . . DEFENDANT.

1878 *July* 31*st*.

No. 2374 of 1877.

Summons to witnesses, Issuing of—Time of issuing summons—Act VIII *of* 1859, *section* 149—*Act* X *of* 1877, *section* 159.

The 20th of March 1877 having been fixed for the final hearing of a suit, the plaintiff, on the 17th of March, and the defendant on the 19th, filed their lists of witnesses to be summoned. Both lists were ordered merely to be put up with the record. When the suit came on for hearing it was dismissed on the ground that, when the plaintiff filed his list there was not sufficient time left to summon the witnesses. *Held*, that the Judge was not justified in dismissing the suit on this ground, unless he found that it would have been *absolutely impossible* to secure the attendance of the witnesses had the summonses been granted on the 17th instant.

Section 149 of Act VIII of 1859, and section 159 of Act X of 1877, discussed.

SPECIAL APPEAL from a decree passed by the Judge of Assam Valley, affirming that of the Deputy Commissioner of Goalpara.

Baboó *Mohiny Mohun Roy*, and Baboo *Kishory Mohun Roy*, for Appellant.

Baboo *Hem Chunder Banerjee*, and Baboo *Ishwar Chunder Chuckerbutty*, for Respondents.

The facts of the case are sufficiently set forth in the judgment of the High Court (1), which is as follows:—

In this case we find that the plaintiff's suit has been dismissed by both the Courts below, on the ground that on the appointed day of hearing the plaintiff was not ready with his witnesses. The facts with reference to this matter stand thus: After the issues were recorded the 20th of March 1877 was fixed for the final hearing of the case. On the 17th of March the plaintiff's

(1) MITTER and MACLEAN, *J.J.*

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Judgment.

vakeel applied to the Court, with a list of witnesses, for summonses against them. No definite order seems to have been passed upon this application. The order passed simply was, that the petition must be put up with the record. We also find that two days later, that is on the 19th of March, the defendant also filed his list of witnesses, and asked for summonses, and a similar order was passed upon it. Then the case came on for hearing on the day appointed, and the Officiating Deputy Commissioner, in his judgment, remarks that "neither plaintiff nor defendant took any steps for the summoning of their witnesses till the 17th instant, when the plaintiff filed a list of witnesses whom he wished to have examined. Two days later the defendant filed his list, but in neither case was there sufficient time left to summon the witnesses." We do not find that in this case the Officiating Deputy Commissioner adverting to the special facts connected with the summoning of the witnesses says that it was absolutely impossible to have secured the attendance of the witnesses if the prayer for summonses against them had been granted on the 17th of March. After reciting the facts, he says simply that, "in neither case was there sufficient time left to summon the witnesses." On appeal the District Judge seems to think that the Deputy Commissioner found that it was impossible to serve the summonses on plaintiff's witnesses in time, so that they might be present on the date of hearing. So far as the record of the first Court goes, we do not find that there is anything in it which warranted the District Judge in finding this, and therefore we must take it that what really happened was this, that on the 17th of March, when the plaintiff filed his list of witnesses, no order was passed upon his application; and on the day fixed for the hearing of the case the Deputy Commissioner was of opinion that there was not sufficient time to summon the witnesses. Under these circumstances we think that the Courts below have erred in law. Under section 149, Act VIII of 1859, very little discretion, if any discretion at all, is left to the Court in the matter of an application for summonses upon the witnesses if such applications be made before the day of hearing. The new Procedure Code, section 159, makes it still more clear. That section says:

"The parties may, after the summons has been delivered for service on the defendant, whether it be for the settlement of issues only, or for the final disposal of the suit, obtain on application to the Court, or to such officer as it appoints in this behalf, before the day fixed for such settlement or disposal, as the case may be, summonses to persons whose attendance is required either to give evidence or to produce documents." However, under the old Law, even admitting that there was some discretion left to the Court to refuse an application of this kind, we think that this discretion must be limited to cases where the Court finds that it is *absolutely impossible* to serve the summons upon a witness in time so as to secure his attendance on the day of hearing; and we do not think that, under that section the Court has any discretion to speculate upon the grounds which do not make it clear that it is absolutely impossible for the witnesses to be present. We do not think that the Court of First Instance exercised its discretion in refusing the application of the 17th March, within the limit above laid down. As in this case the Deputy Commissioner did not find that according to his opinion it was absolutely impossible for the summons to be served so as to secure the attendance of the witnesses on the day fixed for hearing, we think that the Courts below were not right in dismissing the plaintiff's suit without giving him an opportunity to produce his witnesses. We, therefore, set aside the judgments of the Courts below, and remand the case to the Court of First Instance to be properly tried. Costs to follow the result.

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were brought was the mouzah called Mouzah "Inglis" district of Shahabad. That mouzah, many years ago, was to Gooran Khan, an invalided havildar, under the provi the 23rd section of Regulation XLIII of 1793. By virtu section Gooran Khan held the property free of revenue a of rent during his life as a jageer, but upon his death perty became liable to be assessed, and by virtue of the to which allusion has been made, the assessment would b nature of rent payable to the zemindar of the estate i the mouzah was situate. The zemindar in question Maharajah of Domraon. Upon the death of Gooran Bachoo Khan, his son and heir, came in as his repres and the property then being liable to assessment, he ente a settlement with the Maharajah in September 1827, upo a rent was reserved to the Maharajah in respect of the Bachoo Khan died in October 1860, a period within twel before the commencement of the suit. He left a widow, and a son, Gooder Khan, and three daughters, Nazeerun, bun, and Peerzadi. The son was entitled to a share annas seven pies and four krants, and the three daughte entitled to shares amounting together to eight annas four sixteen krants of the mouzah. The widow appears to hav up her share altogether, and it may be assumed for the of this decision that the son took the widow's share, together with his own share of five annas seven pies a krants, gave him an interest to the extent of seven anna pies and four krants. That interest added to that of the ters' makes up the whole amount of the sixteen annas mouzah.

After the death of Bachoo Khan, his son, Gooder Kh sued in respect of a loan which had been made to Bacho Proceedings went on, and a decree was ultimately obtaine arbitration against Gooder Khan. Gooder Khan, in o raise money to satisfy that decree, borrowed a sum of from Ram Jeawan Singh. Gooder Khan was sued b Jeawan Singh in respect of the money so borrowed; and, a Gooder had mortgaged a twelve annas share of the mo Ram Jeawan as a security for the loan, the action against

Khan was treated merely as one for an ordinary debt, and Ram Jeawan obtained a decree against him for the money due, and interest. Upon that an execution was issued. Bisheshur purchased under that decree, not the twelve annas share, which had been mortgaged, but merely the right and interest of Gooder Khan, which, as already stated, amounted to seven annas seven ies and four krants. The Maharajah also brought a suit against Gooder Khan for three years' rent, which was due under the settlement made with him. That suit was brought under the provisions of Act VIII of 1869 of the Government of Bengal. In that suit it was ordered that an *ex-parte* decree be passed in favor of the plaintiff; that the plaintiff do recover the amount claimed, with costs, and interest at the rate of six per cent. per annum up to the day of realization from the defendant. The Maharajah proceeded to execute that decree against Gooder Khan. On the 31st March 1872 he applied to have it executed. He gave the names of the parties, and then he stated what redress he sought from the Court. He stated under that head, "the attachment and sale of the property belonging to the judgment-debtor," that is, the property belonging to Gooder Khan. The petition ran in this way:—"The decretal money due to your petitioner is payable by the judgment-debtor under a decree mentioned above. Your petitioner, therefore, begs to file this petition along with an inventory of the property belonging to the judgment-debtor, and prays that by attachment and sale of the judgment-debtor's property, the decretal amount, together with costs and future interest up to day of realization, be ordered to be recovered from the judgment-debtor." An inventory was attached to that petition in the following words:—"Inventory of the invalid lands, being the kasht (cultivation) of the judgment-debtor, situated in Mouzah Rampore, Pergunnah Bhojepore, for the recovery of the arrears of rent whereof the present decree is passed, amounting to 120 beegahs." It, therefore, appears clear that the application was merely that by attachment and sale of the judgment-debtor's property, the decretal amount might be realized. By virtue of the 59th section of the said Act VIII of 1869, the Maharajah, if he had pleased, was authorized to apply for the sale of the tenure. By that section it is enacted that,

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"whenever a decree shall be passed for an arrear of rent due in respect of an under-tenure, which by the title deeds or the custom of the country is transferable by sale, and the judgment-creditor shall make application for the attachment and sale of such under-tenure, the Court shall, so soon as such under-tenure shall have been ordered to be sold, cause to be hung up in some conspicuous part of the building in which such Court sits, and of the buildings in which the Collector and Judge of the district within which the land comprised in such under-tenure is situate, and to be fixed on some conspicuous place on such land, and on some conspicuous place in the town or village in or nearest to which such land is situated, a notice for the sale of such under-tenure on some fixed day, not less than twenty days from the hanging up of such notice in such Court." By section 34 of the same Act it is enacted that, "save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the Code of Civil Procedure passed by the Governor-General in Council, being Act VIII of 1859, and by such further and other enactments of the Governor-General in Council in relation to Civil Procedure as now are or from time to time may be in force; and all the provisions of the said Act and of such other enactments shall apply to such suits." It appears, therefore, that although the Maharajah might, if he had pleased, have applied to sell the tenure in execution of his decree, he had also a power to proceed against the property of the defendant. It has already been shown what the application of the Maharajah was. He asked that the decree might be realised by the sale of the property of the judgment-debtor. Upon this application the Moonsiff issued a perwannah described as a "perwannah for execution of a decree under section 233 of section 238, Act VIII of 1859." If he had considered that the application was an application to sell the tenure under section 31 of Act VIII of 1869, it would have been described as a procedure under that section, and not under the sections of the Civil Procedure Code, to which the Moonsiff refers in his perwannah. The perwannah issued to the officer was as follows:—"Pursuant to an order of this day, you are required to attach the

mentioned properties under the provisions of Act VIII of 1859, as they may be pointed out by the decree-holder, and submit the inventory of the property attached, with your report, within a week." Then he describes the property: "Invalid land held in cultivation," and he gives the boundaries of the land. So that the perwannah was merely to attach that property under the provisions of Act VIII of 1859. Now it is clear that in attaching the property of a judgment-debtor, whether in an under-tenure or in any ordinary leasehold interest, under Act VIII of 1859, you can only attach and sell the right, title, and interest of the judgment-debtor, but if you proceed to sell a tenure under section 59 of Act VIII of 1869, then you sell the tenure; and by virtue of section 66 of the same Act, the purchaser under the provisions of sections 59 and 60 of the Act acquires it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement. So that if this tenure had been sold under the provisions of section 59, the sale would have got rid of all under-tenures, and the purchaser would have been entitled to the whole interest in the tenure, free from all incumbrances, in the same way as if the tenure had been sold under the provisions of the law for the sale of an estate for the arrears of Government revenue. Having issued that perwannah to the officer to execute the decree, notice of the intended sale was given. That will be found at page 71 of the record. It is headed "Sale Notification," not under section 59 of Act VIII of 1869, but "a sale notification under section 246 of Act VIII of 1859," and it proceeds: "Auction sale of the rights and interests in the undermentioned properties for the realisation of the amount covered by the decree." And then it states: "Notice is hereby given to the public that Sahib Ram filed, on the 31st March 1872, an inventory of the undermentioned property, praying for their auction sale for the realisation of the decretal money; therefore this proclamation is issued for the information of the public, to the effect that on Friday, July 19th, 1872, A. D., corresponding with the 28th Assar 1279 Fusli, the auction sale of whatever rights and interests Gooder Khan, the

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judgment-debtor, has in the property detailed below, will be commenced at noon in the place where the property is situated in Pergunnah Bhojepore, Zillah Shahabad. If any one wishes to purchase the said rights, he ought to appear at the aforesaid time and place, either personally or through his mookhtar, and purchase it. The rights and interests of other persons in the said property will not be sold by auction besides that of the judgment-debtor." So that there was an express notice that under the sale in execution of the decree only the rights and interests of the debtor were to be sold; and it was also expressly pointed out that the rights and interests of other persons in the said property, other than those of the judgment-debtor, would not be sold. Under that notification Doolar Chand and others, the defendants in the two suits out of which this appeal arises, purchased. The sale to them was confirmed, and they were put into possession and obtained a certificate of sale. The certificate which they obtained was as follows:—"On a petition having been filed for execution of a decree of the Civil Court passed by the Moonsiff of Buxar, Zillah Shahabad, dated the 2nd December 1871, A.D., in suit No. 16, against the judgment-debtor, and for the sale of his property, a sale notification was under the order of this Court issued, and the property sold at auction on the 25th July 1872. Whatever rights and interests the judgment-debtor had in the said property were purchased by Doolar Chand," and so on. Those are the defendants. "Hence, this certificate being made over to Doolar Chand, Baijnath, and Ram Saran Sahoo, &c., the auction purchasers, it is proclaimed that whatever rights and interests the said judgment-debtor has in the property aforesaid, have ceased to exist from the 25th July 1872, the date of the auction sale, and become vested in the auction purchasers, Doolar Chand, Baijnath Sahoo, and Ram Sarun Sahoo." Nothing then can be clearer than that both the perwannah and the notice of sale, as well as the certificate, gave express notice to the purchasers that nothing would be sold, and that nothing was sold to them save and except the rights and interests of the judgment-debtor.

Here it may be observed that if the notice of sale had stated that the tenure was to be sold under the provisions of Act VIII of 1869, the three sisters of Gooder Khan might have protected the

tenure from sale, by satisfying in accordance with the provisions of that Act, the decree of the Maharajah. The purchasers having been let into possession, Chabeel Chand, one of the plaintiffs, purchased the interests of the three sisters. They were entitled to eight annas four pies and sixteen krants in this tenure, and the plaintiff, Chabeel Chand, purchased that right, and he contended that under his purchase he was entitled to recover from the auction purchasers, under the Maharajah's decree, the eight annas four pies and sixteen krants which he had purchased from the sisters. Lalla Bisheshur Dyal, who had purchased under the decree of Ram Jeawan Singh, also claimed that he was entitled to recover possession of what he had purchased under Ram Jeawan Singh's decree, and that he had purchased under Ram Jeawan Singh's decree, the right, title and interest of Gooder Khan previously to the sale under the Maharajah's decree. The Judges of the lower Courts dismissed the claims, both of Bisheshur and Chabeel Chand. But the High Court reversed those decisions, upon the ground that Doolar Chand and others had purchased under the Maharajah's decree only the right, title, and interest of Gooder Khan. If they purchased the tenure they would have been entitled to retain possession, and the plaintiffs would have failed in their suit. On the other hand, if they purchased merely the right, title, and interest of Gooder Khan, then in the one case Chabeel was entitled to recover the eight annas four pies and sixteen krants share of the mouzah which he had purchased from the sisters, and Bisheshur was entitled to recover the other portion of the estate which he had purchased as the right, title, and interest of Gooder Khan. It has already been shown what the nature of the sale in execution of the Maharajah's decree was, and their Lordships think that the High Court were right in the conclusion at which they arrived, that Doolar Chand and others, the defendants in the suits, had purchased merely the right, title, and interest of Gooder Khan, and not the whole tenure free from all incumbrances and the rights of others who were interested therein.

Under these circumstances, they are of opinion that the High Court was right in holding that Chabeel Chand was entitled to recover the eight annas four pies and sixteen krants, and that

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Bisheshur Dyal was entitled to recover the interest which he purchased under the sale in execution of Ram Jeawan Singh's decree. The High Court, however, appear to have made a mistake. They appear to have been under the impression that Gooder Khan, instead of being entitled only to seven annas seven pies and four krants share, was entitled to a twelve annas share in the property, and they accordingly gave Bisheshur a decree for a twelve annas share, as well as a decree to the other plaintiff for an eight annas four pies and sixteen krants share. It is impossible that those two decrees can stand, because that would give a right to the two plaintiffs to recover against the defendant twenty annas four pies and sixteen krants out of sixteen annas. It is clearly an oversight, and Mr. Doyne, the learned Counsel for Bisheshur, has admitted that the decree in Bisheshur's case was erroneous, and that instead of a twelve annas share it ought to have been a seven annas seven pies and four krants share.

Their Lordships, therefore, will humbly advise Her Majesty that the decision of the High Court in Chabeel Chand's suit be affirmed, and that in Bisheshur's case the decree be amended by ordering that he shall recover a seven annas seven pies and four krants share of the estate from the defendants.

Their Lordships are also of opinion that the respondents in both appeals are entitled to their costs.

[CIVIL APPELLATE JURISDICTION.]

RAJENDRO NARAIN NEOGI AND ANOTHER . PLAINTIFFS ;

AND

RAJA KUMUD NARAIN BHUP . . . . DEFENDANT.

1878 *July* 31*st*.

No. 2374 of 1877.

Summons to witnesses, Issuing of—Time of issuing summons—Act VIII *of* 1859, *section* 149—*Act* X *of* 1877, *section* 159.

The 20th of March 1877 having been fixed for the final hearing of a suit, the plaintiff, on the 17th of March, and the defendant on the 19th, filed their lists of witnesses to be summoned. Both lists were ordered merely to be put up with the record. When the suit came on for hearing it was dismissed on the ground that, when the plaintiff filed his list there was not sufficient time left to summon the witnesses. *Held*, that the Judge was not justified in dismissing the suit on this ground, unless he found that it would have been *absolutely impossible* to secure the attendance of the witnesses had the summonses been granted on the 17th instant.

Section 149 of Act VIII of 1859, and section 159 of Act X of 1877, discussed.

SPECIAL APPEAL from a decree passed by the Judge of Assam Valley, affirming that of the Deputy Commissioner of Goalpara.

Baboo *Mohiny Mohun Roy*, and Baboo *Kishory Mohun Roy*, for Appellant.

Baboo *Hem Chunder Banerjee*, and Baboo *Ishwar Chunder Chuckerbutty*, for Respondents.

The facts of the case are sufficiently set forth in the judgment of the High Court (1), which is as follows :—

In this case we find that the plaintiff's suit has been dismissed by both the Courts below, on the ground that on the appointed day of hearing the plaintiff was not ready with his witnesses. The facts with reference to this matter stand thus: After the issues were recorded the 20th of March 1877 was fixed for the final hearing of the case. On the 17th of March the plaintiff's

(1) MITTER and MACLEAN, *J.J.*

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vakeel applied to the Court, with a list of witnesses, for summonses against them. No definite order seems to have been passed upon this application. The order passed simply was, that the petition must be put up with the record. We also find that two days later, that is on the 19th of March, the defendant also filed his list of witnesses, and asked for summonses, and a similar order was passed upon it. Then the case came on for hearing on the day appointed, and the Officiating Deputy Commissioner, in his judgment, remarks that "neither plaintiff nor defendant took any steps for the summoning of their witnesses till the 17th instant, when the plaintiff filed a list of witnesses whom he wished to have examined. Two days later the defendant filed his list, but in neither case was there sufficient time left to summon the witnesses." We do not find that in this case the Officiating Deputy Commissioner adverting to the special facts connected with the summoning of the witnesses says that it was absolutely impossible to have secured the attendance of the witnesses if the prayer for summonses against them had been granted on the 17th of March. After reciting the facts, he says simply that, "in neither case was there sufficient time left to summon the witnesses." On appeal the District Judge seems to think that the Deputy Commissioner found that it was impossible to serve the summonses on plaintiff's witnesses in time, so that they might be present on the date of hearing. So far as the record of the first Court goes, we do not find that there is anything in it which warranted the District Judge in finding this, and therefore we must take it that what really happened was this, that on the 17th of March, when the plaintiff filed his list of witnesses, no order was passed upon his application; and on the day fixed for the hearing of the case the Deputy Commissioner was of opinion that there was not sufficient time to summon the witnesses. Under these circumstances we think that the Courts below have erred in law. Under section 149, Act VIII of 1859, very little discretion, if any discretion at all, is left to the Court in the matter of an application for summonses upon the witnesses if such application be made before the day of hearing. The new Procedure Code, section 159, makes it still more clear. That section says:

"The parties may, after the summons has been delivered for service on the defendant, whether it be for the settlement of issues only, or for the final disposal of the suit, obtain on application to the Court, or to such officer as it appoints in this behalf, before the day fixed for such settlement or disposal, as the case may be, summonses to persons whose attendance is required either to give evidence or to produce documents." However, under the old Law, even admitting that there was some discretion left to the Court to refuse an application of this kind, we think that this discretion must be limited to cases where the Court finds that it is *absolutely impossible* to serve the summons upon a witness in time so as to secure his attendance on the day of hearing; and we do not think that, under that section the Court has any discretion to speculate upon the grounds which do not make it clear that it is absolutely impossible for the witnesses to be present. We do not think that the Court of First Instance exercised its discretion in refusing the application of the 17th March, within the limit above laid down. As in this case the Deputy Commissioner did not find that according to his opinion it was absolutely impossible for the summons to be served so as to secure the attendance of the witnesses on the day fixed for hearing, we think that the Courts below were not right in dismissing the plaintiff's suit without giving him an opportunity to produce his witnesses. We, therefore, set aside the judgments of the Courts below, and remand the case to the Court of First Instance to be properly tried. Costs to follow the result.

[CIVIL APPELLATE JURISDICTION.]

1879 *Jan. 6th.*

No. 215 of 1878.

ISHANA DABIA, DECREE-HOLDER . . . . APPELLANT;

AND

GRIJA KANT LAHIRY CHOWDHRY, JUDGMENT-DEBTOR . . . . . RESPONDENT.

Limitation—Execution of Decree—Acknowledgment—Act IX *of* 1871, *section* 20—*Act* IX *of* 1871, *sch.* II., *art.* 167.

Application for execution of a decree against the heir of the judgment-debtor was made on the 26th July 1871. On the 30th November of the same year the debtor applied by petition for two months' time. The application for execution was struck off for default. A subsequent application for execution was made on the 5th September 1874, and now again on the 22nd September 1877.

Held, that the petition of the 30th November 1871 was not an acknowledgment within the meaning of section 20 of Act IX of 1871, so as to save limitation, and that the decree was barred at the date of the application for execution (5th September) in 1874.

Held, also, that the fact of the application for execution in 1874 having been granted did not prevent the Court from looking behind, to see if the decree were barred at that time.

Kally Prosunno Hazra vs. *Heera Lall Mundal*, I. L. R., 2 Cal., 468; and *Bissessur Mullick* vs. *Maharajah Mahatab Chunder*, 10 W. R., F. B., 8, followed.

APPEAL from an original order passed by the Officiating Subordinate Judge of Mymensingh.

Phillips and Baboos *Sreenath Dass, Mohesh Chunder Chowdhry, Jogesh Chunder Roy* and *Ishan Chunder Chuckerbutty*, for Appellant.

Evans and Baboo *Mohiny Mohun Roy*, for Respondent.

The facts are sufficiently set forth in the following judgment of the High Court (1) :—

MORRIS, *J.*

MORRIS, *J.* :—

Several questions have been raised, arising out of proceedings taken between the last and the next preceding application for execution, that is, between the 5th of September 1874, and the 22nd of September 1877. But the determination of these

(1) MORRIS and PEINSEP, *J.J.*

unnecessary, if, as has been pointed out, the decree which it is sought to execute was dead on the 5th of September 1874, by reason of the previous application having been made on the 26th of July 1871. It is, however, pointed out that the respondent (debtor) made an acknowledgment of the judgment-debt on the 30th of November 1871, when he asked for two months' postponement of the sale in execution, and a contention is raised, that this is such an acknowledgment in writing of the debt as is contemplated in section 20, Act IX of 1871, and that, consequently, a new period of limitation runs from the date on which it is signed. The application for execution, made on the 5th of September 1874, brings the case under the provision of Act IX of 1871 (see section 4 of that Act). This being so, the acknowledgment in writing of the judgment-debt, dated the 30th November 1871, is not sufficient to save limitation. A consideration of the terms of Act IX of 1871, with the light thrown upon them by Act XIV of 1859 which precedes it, and by Act XV of 1877 which succeeds it, leads to the conclusion that the debt referred to in section 20, Act IX of 1871, is not a judgment-debt, but, as explained in the judgment of a Division Bench of this Court—*In re Kally Prosunno Hazra* vs. *Heera Lall Mundul*, reported in I. L. R., 2 Cal., 468, "a liability to pay money for which a suit can be brought."

An objection is taken that the Court cannot look behind the application of the 5th of September 1874, as that was a *bonâ fide* application made as provided for in article 167 of schedule 2, Act IX of 1871, and was accepted and acted upon by the Court. But this objection is disposed of by the Full Bench Ruling—*In re Bissessur Mullick* vs. *Maharajah Mahatab Chunder Bahadoor*, reported in 10 W. R., 8, Full Bench Rulings.

A decree having been once dead no proceeding by means of an application out of time could revive it. The appeal is dismissed with costs.

PRINSEP, J.:—

PRINSEP, J.

I am of the same opinion. It appears to me that the first objection is disposed of by the judgment reported in I. L. R., 2 Cal., 468—*In re Kally Prosunno Hazra* vs. *Heera Lall Mundul*. The second objection is disposed of by the Full Bench case.

[CIVIL APPELLATE JURISDICTION.]

1879 Jan. 8th.

No. 1064 of 1876.

JATI RAM TALOOKDAR (PLAINTIFF) . . APPELLANT;

AND

DASS RAM KOLITA (DEFENDANT) . . . . RESPONDENT.

Appeal—Agreement not to Appeal—Cause of Action—Act VIII *of* 1859, *section* 2.

A, having sued B for possession of a piece of land and obtained a decree for possession of portion only, entered into an agreement, by the terms of which he was to take a greater part of the land than he was entitled to under the decree, upon the condition that he (A) should not prefer an appeal, and that in the event of his doing so the whole land claimed in the suit should become the property of B. In contravention of this agreement A appealed and obtained a decree for possession of the entire piece of land, whereupon B instituted a suit, claiming to have possession of the same in terms of the agreement. *Held*, that the agreement was valid, although its effect was practically to render the former suit inoperative, and further, that the previous suit between the parties was no bar to B's suit, a new cause of action having arisen upon the breach of the agreement.

SPECIAL APPEAL from a decree passed by the Judicial Commissioner of Assam, dated 7th March 1876, reversing a decree of the Extra Assistant Commissioner and Moonsiff of Burpetta, Assam, dated the 19th July 1875.

Baboo *Bama Churn Banerjee*, for Appellant.

Baboo *Bhuggobutty Churn Ghose* and Baboo *Bhoobun Mohun Dass*, for Respondent.

The facts of the case sufficiently appear from the following judgment of the High Court (1), which was delivered by

MORRIS, *J.*

MORRIS, *J.*:—

In this suit the defendant Dass Ram entered into an agreement with the plaintiff Jati Ram. This agreement was in writing, and is admitted on all hands. By its terms Dass Ram was to take 2 beegahs in addition to 6 beegahs already decreed to him out of a

(1) MORRIS and PRINSEP, *J.J.*

total of 12 beegahs which formed the subject of a suit between them on the condition that Dass Ram preferred no appeal, and that in the event of his appealing the whole 12 beegahs should pass to Jati Ram. Dass Ram did appeal, and obtained a decree for the whole 12 beegahs. Thereupon the plaintiff Jati Ram brings the present suit to enforce the agreement entered into by Dass Ram with him, and to obtain possession of the whole 12 beegahs.

The first Court held the contract to be a good one, and, by way of reasonable compensation within the terms of section 74 of the Contract Act, gave a decree to Jati Ram to the extent of 6 beegahs. On appeal, the Judicial Commissioner dismissed the suit *in toto*, in the following terms:—"It seems to my mind that it was the duty of the plaintiff, respondent, to have produced the agreement which constitutes the present cause of action when defendant, appellant, in opposition to the terms of the document, brought his appeal, and that having maintained silence then, he, plaintiff, cannot now institute a suit, the practical effect of which, if he obtained a decree, would be to reverse the judgment passed by the Appellate Court. This, in my opinion, would certainly be acting in opposition to the spirit of section 2 of Act VIII of 1859."

Against this decree the present appeal is preferred. It is argued that the contract is a valid contract, and that the previous suit between the parties is no bar to the present suit. We think that the ground taken by the Judicial Commissioner is not sound in law. The agreement entered into by the parties was a lawful one, and not made without consideration, and the breach of it gave rise to a distinct cause of action. The rights of the parties in the lands in suit remained as before, and the agreement could not operate as a bar to the hearing of the appeal. We fail to see that the then defendant was under any obligation to bring the agreement to the notice of the Appellate Court, for in deciding the appeal that Court could not be bound by it one way or the other. Neither the silence of the then defendant, nor the practical result of rendering the decree in the former suit inoperative, can hinder the plaintiff from bringing the present suit—his cause of action being new, and being based on the breach of covenant arising out of the act of the defendant in preferring an appeal. The contract was altogether independent of the right of either party to

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the land, and being in our opinion a good contract is capable of being enforced in law. The plaintiff, however, is willing that the decree of the first Court, allowing him 6 beegahs, should stand. We accordingly set aside the judgment of the lower Appellate Court, and affirm that of the first Court with costs in this Court and in the Court below.

[CIVIL APPELLATE JURISDICTION.]

Jan. 16th.

No. 154 of 1878.

PARBUTTI DASSI, (ONE OF THE DEFENDANTS) ... APPELLANT;

AND

RAM CHAND BHUTTACHARJEE, (PLAINTIFF) RESPONDENT.

Possession of Tenant—Adverse Possession—Payment of Rent by Tenant to Stranger—Limitation.

In December 1853 certain lands were let by the plaintiff to B under a kabuliat, by the terms of which the lease expired in December 1863. In March 1875, less than 12 years from the expiration of such lease, the plaintiff brought a suit for possession against B and the talookdars of the estate of which the lands in dispute formed part. The latter alleged that the lakhiraj title of the plaintiff was invalid; that although no proceedings, as required by the Rent Law, had been taken to invalidate the plaintiff's title, they, the talookdars, had resumed possession of the land by receiving the rents from B from 1859, and that the suit was barred by reason of their possession since that date.

Held, that the suit was not barred, inasmuch as nothing had occurred to determine the tenancy which existed between the plaintiff and B, and that the possession of the latter was in law the plaintiff's possession.

APPEAL from appellate decree passed by the Subordinate Judge of East Burdwan, affirming the decision of the Officiating Moonsiff of Cutwa.

Baboo *Umbica Churn Banerjee*, and Baboo *Mohiny Mohun* [illegible] for Appellant.

Baboo *Sham Lall Mitter*, for Respondent.

The facts of this case are sufficiently set forth in the judgment of the High Court (1), which was as follows :—

This was a suit brought by the plaintiff to recover possession of certain land, which, in the month of December 1853, he let to the defendant No. 1, under a kabuliat at a certain rent.

The kabuliat was for a term of 10 years, so that in the ordinary course it would have expired in December 1863, and as this suit was brought in March 1875, the plaintiff as against the defendant No. 1 would not have been barred by limitation. But the defendants Nos. 2 and 3 (who are the talukdars of the estate of which the land in question forms a part) alleged that the lakhiraj title, under which the plaintiff claims, is invalid; and, although they have not taken the necessary proceedings under the Rent Law to invalidate the plaintiff's tenure, they say that since the year 1859 they have in fact resumed possession of the land by receiving rent from the defendant No. 1, so that by that means the plaintiff has been ousted from possession for upwards of 12 years, and the suit is thus barred.

The Moonsiff, in the first Court, found in favor of the plaintiff, but the Subordinate Judge dismissed the suit, upon the ground that if the defendant No. 1 had in fact paid rent to the defendants Nos 2 and 3 for upwards of 12 years before suit, the payment operated in law as a dispossession of the plaintiff, *whether he was aware of the payment or not, and whatever were the circumstances under which it was made.*

On appeal to this Court, we held that the Subordinate Judge was wrong. We considered that the payment of rent by the defendant No. 1 to the defendants Nos. 2 and 3 would not operate as a dispossession of the plaintiff, unless it were made under such circumstances as to amount in law to an eviction of the defendant No. 1, as the plaintiff's tenant, and a termination of his interest under the kabuliat, and we accordingly remanded the case to be tried again upon that view of the law.

The case has now been re-tried, and the Subordinate Judge has found in effect that the defendant No. 1 never did deny or put an end to the plaintiff's title as his landlord; that the defendants Nos. 2 and 3 had no right to the rent which they received from

(1) GARTH, *C.J.*, and MCDONELL, *J.*

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PARBUTTI DASSI v. RAM CHAND BHUTTACHARJEE.

Judgment.

the defendant No. 1; and that this rent was paid to them by the defendant No. 1 collusively; by which we understand him to mean that the defendant No. 1 never openly renounced or put an end to his tenancy, under the plaintiff, but attempted by paying rent collusively to the defendant Nos. 2 and 3 to substitute them in place of his landlord, and to defeat the right of the latter in an underhand way. Upon these facts the Subordinate Judge has decided in the plaintiff's favor, and we think he was right. So long as nothing occurred to determine the tenancy which existed between the plaintiff and the defendant No. 1, the possession of the latter was the plaintiff's possession, and until defendant No. 1 had been evicted from that possession by some third person, or facts equivalent to such an eviction had taken place, his tenancy under the plaintiff must be considered in point of law as continuing. The discontinuance of the tenancy under such circumstances must always be satisfactorily proved by the party who alleges it, and no such proof has been given in this case. The mere payment of rent by the tenant to a third person is clearly not enough.

The appeal is dismissed without costs.

[CIVIL APPELLATE JURISDICTION.]

1879
Jan. 30th.

Rule No. 1119
of 1878.

ROY DHUNPUT SINGH BAHADOOR . . . . . (PLAINTIFF) PETITIONER;

AND

JHOOMUK KHAWAS AND ANOTHER . . . . . (DEFENDANTS) OPPOSITE PARTY.

Civil Procedure Code (Act X of 1877), sections 36 and 51—Plaint, Subscription of—Authorized Agent.

Section 36, read along with section 51, of the Code of Civil Procedure (Act X of 1877), shows that a plaint which may be presented by an authorized agent, may in like manner be subscribed by him, and that that subscription would be a compliance with section 51.

IN this case the facts are these :—The petitioner instituted a suit in the Moonsiff's Court at Madhoopura. The plaint was rejected, and the suit dismissed on the ground that the plaint was subscribed by the plaintiff's agent. The petitioner thereupon moved the High Court to set aside the order of the Moonsiff.

The Court (1) granted a rule; and, on the rule being argued, delivered the following judgment :—

The petitioner in this case, who obtained this rule, complaint that the Moonsiff refused to receive his plaint and returned it, because it was not subscribed by the plaintiff himself. Section 51 of the Code of Civil Procedure requires that the plaint should be subscribed by the plaintiff and his pleader, if any, and then provides for its verification by the plaintiff or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. But the positive requirement as to the subscription is governed by section 36 of the Code which provides that "any appearance, application, or act in or to any Court, required or authorized by law to be made or done by a party to a suit or appeal in such Court, may, except when other-

(1) JACKSON and MCDONELL, *J.J.*

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ROY DHUNPUT SINGH BAHADOOR v. JHOOMUK KHAWAS.

Judgment.

wise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf."

Now, this act of signature, of course, could not be done by the pleader instead of the plaintiff, because the Act requires that the plaint should be subscribed by the plaintiff and his pleader also, and consequently the signature of the pleader could not be taken as that of the plaintiff; but the law permits acts to be done by a recognized agent unless there be anything in the nature of a particular provision of the law which expressly forbids it, and it is evident that there must be some means by which plaints could be presented in Court without the subscription of the plaintiff, because it often happens that the plaintiff is beyond the jurisdiction of the Court, residing in England or in some place at the other end of India. Section 36, therefore, read along with section 51, would seem to show that a plaint which may be presented by an authorized agent may, in like manner, be subscribed by him, and that subscription would be a compliance with section 51. Assuming, therefore, that this plaint was subscribed by a duly authorized agent of the plaintiff, we direct that it be received, and the suit proceeded with.

[CIVIL APPELLATE JURISDICTION.]

IN THE MATTER OF THE SARAWAK AND JAINEE HINDUSTAN BANKING AND TRADING COMPANY, LD.

1879 *Jan. 18th, and Feb. 24th.*

No. 28 of 1878.

Practice—Indian Companies' Act X of 1866, section 141—Notice of Appeal, Extension of Time for.

Under section 141 of Act X of 1866 (Indian Companies' Act), where no notice of appeal has been given within three weeks from the passing of the order complained against, the Court must dismiss the appeal, unless application has been made for the Court to enlarge the time.

Ex-parte Green, 24 L. J. Ch., 331; and *Banner* vs. *Johnston*, L. R., 5 E. and I. App., 157, cited.

IN this case one Baroomull appealed from an order, dated 26th August 1878, passed by Mr. Justice BROUGHTON, directing that he should be placed upon the list of contributories in the liquidation of the Sarawak and Jainee Hindustan Banking and Trading Company, Limited.

Phillips, for the Appellant.

Stokoe (for the Respondents) took a preliminary objection that under section 141 of Act X of 1866, the appeal could not be heard.

The following judgments, dismissing the appeal, were delivered by the Court (1) :—

We think that the preliminary objection taken by the respondent must prevail. The objection is, that this being an appeal under Act X of 1866, no notice of it was given until long after the expiration of the three weeks limited by section 141 of that act. The words of the section are, "that no appeal shall be heard unless notice of the same is given within three weeks after the order complained of has been made." We think that these words impose an actual prohibition upon the Court from hearing the appeal, unless notice of it is given within the three weeks, and the

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case of *Ex-parte Green*, which has been cited by Mr. Stokoe from the 24th L. J., Ch. 331, appears to be precisely in point. That was a case which arose under the 33rd section of 12 and 13 Vic., c. 108, which is the corresponding section in that Act to the 141st section of Act X of 1866, and the Court (Lord Justice KNIGHT BRUCE) held that the provision with regard to the notice being given within three weeks was imperative, and that he had no authority to enlarge the time for giving notice of the appeal after the three weeks had expired. That case seems to be directly in point, and we entirely agree with the decision.

The appeal is, therefore, dismissed with costs.

WHITE, *J.*

WHITE, *J.* :—

I am of the same opinion. In this case no notice was given of the appeal, or of the intention to appeal, within three weeks after the order was made which is complained of, nor is any order produced showing that the appellant procured an extension of the time. Under these circumstances, it appears to me that we are actually prohibited by the strong language of section 141 from hearing the appeal.

The appellant then applied for, and obtained, a Rule to show cause why a review of the judgment of their Lordships should not be granted.

Jackson now showed cause.
Phillips contra.

The following judgments were delivered by the Court :—

GARTH, *C.J.*

GARTH, *C.J.* :—

I think that this Rule should be discharged.

We are asked to review our former judgment, and virtually to set it aside, upon the ground that, although no notice of the appeal was in fact given to the respondent within three weeks from the date of the order appealed against, that was not the fault of the appellant, but of the officer of this Court; and that the appellant has done all that he was bound to do by merely lodging his appeal within three weeks from the date of the order.

Now, it is perfectly true, that the 141st section of Act X of 1866 does present some difficulty in this respect, because the appellant's right of appeal under that section is made to depend upon a notice being given, *not by himself, but by an officer over whom he has no control.*

It is probable that the Legislature, when they passed the Act, did not foresee this difficulty. Section 141 corresponds with the 124th section of the English Joint Stock Companies' Act of 1862 (25 and 26 Vic., c. 89), which contains the same provision as to the three weeks' notice.

By the English Act, the notice is to be given *in the manner in which notices of appeal are ordinarily given, according to the practice of the Court appealed from.*

By the Indian Act of 1866, the notices are to be given *in the manner in which notices of appeal are ordinarily given under the Code of Civil Procedure.*

Now, in England, the practice is, that such notices are *served by the appellant or his attorney;* so that if the notice is not given within the proper time, the appellant has only himself to blame. But in India, under the Civil Procedure Code, the service is effected *by the Court;* so that the appellant's right of appeal depends not on himself, but upon whether the officer of the Court performs his duty.

Of course this might operate very unjustly; but we are no less bound by the provisions of the section, and unless we find that the notice has been given within the three weeks, or the time or giving it has been extended, we have no right to hear the appeal.

I cannot accede to Mr. Phillip's argument, that because it was not his client's duty to serve the notice, it became immaterial to his right of appeal whether the notice was served or not.

The notice is, of course, intended for the benefit of the other parties who are interested in the winding up proceedings, and to prevent those proceedings being unduly delayed. The appellant's proper course clearly was to ascertain whether the notice had been served within the three weeks; and if he found that it had not, he should have applied to this Court at the earliest opportunity to extend the time for giving it.

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I was certainly under the impression, when we dismissed the appeal, that the Court could not have extended the time for service of the notice after the expiration of the three weeks. The language of Lord Justice KNIGHT BRUCE in the case of *Ex-parte Green*, 24 L. J., Ch. 331, seemed to support that view. But after hearing the point argued again, and considering the case of *Banner* vs. *Johnston*, L. R., 5 E. and I. Appeals, 157, I think it clear that the time for giving the notice may be extended by the Court after the three weeks have expired. In this case the appellant could not possibly have applied within the three weeks, because the Court of Appeal was not sitting.

But the difficulty which I feel in assisting the appellant in the present state of things is this:—At the time when the appeal came on to be heard, no notice had been given within the three weeks, nor had the time for giving it been extended, *nor had any application been made by the appellant for that purpose.* Mr. Phillips acknowledges very frankly and properly that the point took him and his clients completely by surprise. They do not appear to have been aware of the necessity of any notice, and even at the last moment no application was made to extend the time for giving it. That being so, we had no alternative but to dismiss the appeal; and we are now asked to say that our judgment was erroneous, upon the ground that the notice should have been given by the officer of the Court, and that the appellant consequently was not in fault.

Now with every wish to assist the appellant, if I could properly do so, I cannot say that our judgment was erroneous, or that if we had to decide the case again, we could do so otherwise than by dismissing the appeal. The appellant ought to have been aware of the provisions of section 141. He should have ascertained whether the notice of appeal had been duly given; and if he found that it had not, he should have applied to extend the time. Not having done this, I think that it is not in our power to assist him; and that consequently his Rule must be discharged with costs.

WHITE, *J.*

WHITE, *J.*:—

I concur.

[CIVIL APPELLATE JURISDICTION.]

CHIN HONG & Co. . . . . (PLAINTIFFS,) APPELLANTS;

AND

SENG MOH & Co. . . . . (DEFENDANTS) RESPONDENTS.

1879 *Feby.* 10*th.*

No. 240 of 1877.

Carrier by sea—Bill of Lading—Loss by fire—Liabilities of ship-owners for goods after being landed.

The defendants, who were ship-owners, under a bill of lading undertook to carry and deliver to the plaintiffs certain goods, subject, *inter alia*, to the following conditions, viz., that the defendants should not be liable for loss from the "act of God, the Queen's enemies, restraint of Princes or Rulers, pirates or robbers by sea or land, accidents, loss and damage from vermin, barratry, jettison, collision, *fire*, machinery, &c.," and that "the goods were to be taken from the steamer's tackles by the consignees—failing which the steamer's agents were to be at liberty to land them at the godowns." On arrival at its destination, the vessel went at once alongside the wharf and landed the goods into godowns hired by defendants from the Custom House, no opportunity having been afforded to the plaintiffs to take delivery from the ship's tackle. Shortly after being landed, the goods were destroyed by fire in the godowns, but through no fault of the defendants. It was proved that the plaintiffs had paid the wharfage and godown rent.

Held, that the plaintiffs had, by their conduct in so paying the wharfage and godown rent, acquiesced in the goods being placed in the godowns instead of being delivered over the ship's side, and that the defendants were not liable for the loss, the goods having been destroyed by fire while in their hands as wharfingers, and through no fault or neglect on their part.

REGULAR APPEAL from a decision of the Recorder of Rangoon.

The facts are fully set out in the following extracts from the judgment appealed against, which was as follows:—

This suit is brought to recover the sum of Rs. 8,612-4, being the value of certain betelnut and tobacco shipped by the plaintiffs in Calcutta on board the steamer *Fitzpatrick*, to be carried and delivered to the plaintiff in Rangoon under a bill of lading bearing date 6th December 1876.

All the goods shipped were delivered, except 181 bags betelnut and 101 bundles tobacco.

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The plaintiffs state that they paid the defendants the freight for the entire quantity of the goods shipped, and also wharfage for landing them at the Latter Street Wharf on the river side.

By the bill of lading the defendants undertook to carry and deliver the goods subject, amongst others, to the following conditions, viz., that they should not be liable for loss from the "act of God, the Queen's enemies, restraint of Princes or Rulers, pirates or robbers by sea or land, accidents, loss, and damage from vermin, barratry, jettison, collision, fire, machinery," &c. Another condition in the bill of lading was "that the goods were to be taken from the steamer's tackles by the consignees as fast as the steamer could discharge, failing which the steamer's agents were to be at liberty to land them at their godowns, the cost of lighterage, godown rent," &c., thereby incurred to be borne by the consignee. The bill of lading was signed by the master of the *Fitzpatrick*. The steamer arrived here early in the afternoon of the 11th December last, and is a vessel that trades between Singapur, Rangoon, and Calcutta, and the ports along the Coast between Rangoon and Singapur. She is owned by certain Chinese merchants, of whom the defendants are some. On this occasion she came at once alongside the Latter Street Wharf instead of discharging her cargo into boats as she lay in the stream as admittedly was her wont, and appears to have commenced to discharge on the same day, placing the cargo, as it was discharged, in the godowns attached to the wharf, which with the wharfs were let to the defendants, who charge wharfage on all goods that are landed there and placed in the godowns. On the 12th December the plaintiffs commenced to take delivery of their goods from the godown, and continued doing so the whole of that day till the evening. At about 7 o'clock that evening, after the godowns had been closed by the Custom House officers, a fire broke out in them, which burnt them down and consumed all the goods that were there. The defendants allege that the goods short delivered to the plaintiffs were in the godowns and burnt with all the other merchandize that was stored in them, but the plaintiffs nevertheless claim to be paid the value of the goods, on the ground that they have not received all the goods which the defendants, as common carriers, were bound to deliver to them. They also hold the defendants liable to make good the loss on the ground that no notice of the time when the vessel would commence to discharge her cargo was given, that the defendants were not ready or willing to give delivery, and that the defendants are not relieved from liability, notwithstanding the exception against fire in the bill of lading. On the other hand, the defendants contend that the plaintiffs were not ready and willing to take delivery, that they are not liable for the destruction of the goods by fire by reason of their holding them at the time of their destruction as warehousemen and not as common carriers, and further that, if they did not hold them as warehousemen, they are protected by the terms of the bill of lading . . . . . .

There is ample evidence so far that they knew of the steamer's arrival and that she had gone alongside the wharf. Their evidence goes on to show that, as soon as they got the bill of lading, they sent it to the plaintiffs to be endorsed for delivery of the goods. This endorsement was clearly made not later than the evening of the 11th, although the clerk says it was the next day, for the plaintiff, who confirms the evidence of the defendants on this point himself, says that it was endorsed the same evening as he got it. The clerk also says that when he saw the steamer coming up the river, he went and got a Custom House pass in order that they might get their goods without delay, and it also appears that he was told when he got the bill endorsed to make haste and take the goods. The plaintiffs did not commence that same evening to take delivery, although the vessel began to discharge her cargo directly after she was secured alongside the wharf, and it was not till early on the 12th that they did so, when they began and continued to take all they could that day until they could get no more.

The endorsement on the bill of lading is in Chinese, and is translated "freights and wharfage paid," which was regarded and accepted as an order to deliver. The plaintiffs say they had no notice that the vessel was ready to deliver. Now their house of business is quite close, not more than 230 yards from the wharf, and from its position they could not have helped seeing the vessel discharging, for there was nothing along the road to interrupt the entire view of the wharf. Taking, therefore, into consideration the fact that they had got a delivery order, and knowing that the vessel was alongside the wharf, and that she would, as she was accustomed to do, discharge as fast as she could, and that they were told to take their goods quickly, a formal notice was not necessary that unless the plaintiffs took delivery from the ship's tackle the goods would be landed at the wharf. Besides, I am of opinion they waived any such right to receive the goods from the ship's tackles by paying or agreeing to pay wharfage and godown and other charges without the slightest demur.

As regards the first issue, I am of opinion that the plaintiffs showed no reluctance nor undue delay in taking delivery, and find on this issue that they were always ready and willing to take delivery. The second issue I also give in favor of the plaintiffs, inasmuch as the defendants gave the plaintiffs no opportunity of taking the goods themselves from the ship's tackles, because, as she came alongside the wharf and commenced directly to discharge her cargo into the godown, it was impossible for the plaintiffs so to take delivery even if they were desirous of doing so; and I am also of opinion that the *Fitzpatrick* came alongside and discharged her cargo at the wharf for the convenience and profit of the defendants, but I find that the plaintiffs impliedly waived their right to have delivery from the ship's tackles, and consented to take delivery from the godown by paying the wharfage and godown charges. It was attempted to be shewn that the plaintiffs might have sent their men, if they chose to do so, to take delivery

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from the ship's side as the goods came out of the hold; but the evidence of the Custom House officers shows that it would have been impossible to do so with any degree of convenience, if every consignee was thus to take delivery of his goods.

Now comes the important question, and the one upon which the liability or non-liability of the defendants entirely rests:—Whether the defendants, having placed the goods in the godowns, they were still in the position of common carriers or warehousemen when the goods were burnt. In the view I take from the evidence, they were in the position of common carriers and not warehousemen when the fire broke out. It might have been different had a reasonable time been afforded to the plaintiffs after notice had been given of the vessel's being ready to discharge to take away their goods from the wharf, and the defendants had then stored them in the godowns for safe custody after the plaintiffs had refused or neglected to take delivery, for then there might have been grounds for saying they were warehousemen and claiming exemption from liability for any loss that had occurred in their warehouse that did not arise from their negligence; but I find that no delivery was given or intended to be given on the wharf, until after the goods had reached and were placed in the godown, and consequently that the defendants are liable as common carriers for all the goods the plaintiffs did not receive from the godowns, unless there is any limitation of that liability in the bill of lading under which the goods were agreed to be conveyed and delivered. The bill of lading does stipulate that the owners shall not be liable for loss occasioned by *fire*, and the goods in question beyond all doubt were destroyed by fire in the godown before they were delivered. But it is contended by the plaintiffs that this exemption only applies, if it applies at all, to loss by fire on board the steamer, and does not extend to fire that occurred after the goods were landed. In a somewhat recent case, *The Hongkong and Shanghai Banking Corporation* vs. *Baker*, 7 Bom. H. C. R., 186, it was held that under a bill of lading, which exempted the master from liability from loss occasioned by fire, he was protected from liability from loss by fire, where he lawfully landed goods from vessel at the port of discharge so long as they remained in his custody after being so landed, for that the reasonable mode of construing the contract in the bill of lading was to treat the exceptions as co-extensive with the liability, that is, until delivery to the consignee.

It may be said that by reason of the vessel having come alongside of the wharf, and the consignees having had no opportunity to take delivery, the defendants by this act should forfeit their rights under the condition in the bill of lading, for the master of a ship cannot divest himself of all further liability as a common carrier by immediately on arrival landing the goods on a wharf without notice to the consignee, for he is bound to keep them a reasonable time on board or on the wharf at his own risk to enable the consignee to come and take them—See *Bourne* vs. *Gatliff*, 11 Cl

ınd that might be so if the only question was as to delivery. ſ counsel relied upon the following cases, viz., *Oakeley* vs. *nd Ryde United Steam Packet Company*, L. J., 15 Exch., 99; *Pollok*, 1 Ell. and Bl., 743, and also *Bourne* vs. *Gatliff*, 11 Cl. l sought to distinguish the two cases cited by the other side, *ngkong and Shanghai Banking Corporation* vs. *Baker*, and *The B. I. S. N. Company, Limited*, decided by this Court in ion No. 88 of 1871 . . . . . .

ı far assumed that the goods were burnt in the godowns ıe wharf, and from the evidence there can be little doubt that 'he plaintiff's counsel contended that there was not sufficient pport this statement; and therefore to some extent rested this n the fact of non-delivery. But I think that the defendants all reasonable doubt, shown that the goods were taken from l placed in the godowns, and that they were burnt there on the 2th December last. The plaintiffs received as much as they the 12th from the godown, and on the 14th and 15th they ıg delivery from the ship's side until she had discharged all her defendants gave evidence to shew that the whole ship was nd that the captain got his discharge. This last fact may not idence against the plaintiff, but I think I may take it for what one of the facts in the case, since the counsel for the plaintiff ıt to it.

is the tally book (exhibit I) of which I was somewhat suspi- ɔf its having been made up for the occasion, and I therefore ıestions to the clerk, who said he made it up and kept it res- ɔook, and he had written it up. His answers satisfied me that 'uthful witness, for he gave a reasonable explanation for the ɔf writing and apparent newness of the book. He stated that 'her men in the godowns who kept tally on a slate, and although ɔt read English, they could distinguish and draw the marks; the goods came in they scored them on the slate in strokes of lines, and one across for each mark, and that, when the slate ɔy brought it to him and he wrote down the numbers of each book in figures. The slate is sworn to as having been burnt. ɔubt the primary evidence to show what goods entered the ıt as its non-production has been satisfactorily accounted for, ıft in the godown the evening the latter was burnt, and was no with the other things that were stored there, I can receive the idence of the tally-book. Now if the number of each mark ı tally-book is added to the number of packages and bags that ed by the plaintiffs on the 12th from the godown, and those taken delivery of from the ship after she had been removed ıarf, they make up the whole of the quantity of betelnuts and

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tobacco shipped, with the exception of one bundle, which defendants admit they cannot trace and are ready to pay for, but for which I cannot assess the damages, as the plaintiffs have given me no evidence as to its value. Now I think the only reasonable conclusion to come to upon such evidence is, that the missing or non-delivered goods were taken and placed in the godowns, and that they were destroyed in the fire that took place. Then taking this evidence together with the tally-books of the ship, which show that the vessel discharged all her cargo, and from which the captain got a full clearance from the owners, I find as a fact that the goods short delivered were not lost otherwise than by being destroyed on the night of the 12th December last by fire by accident, which was not attributable to the negligence of the defendants whilst the goods were in their possession under the conditions as to fire contained in the bill of lading.

I therefore dismiss the suit with costs.

Against this decision the plaintiff's appealed.

J. D. Bell (for the Appellants).—In the case of *Bullock* vs. *Toay Aung*, 24 W. R., 74, where the liability of the Company was, by the bill of lading, to cease after delivery from ship's tackle, and the goods were taken off in lighters and then lost, the Company was held not to be liable.

Here the question to be decided is,—whether the defendants are to be held liable for the loss of the goods, the fire by which they were destroyed having taken place not in the ship itself, but in the Custom House godown into which they had been landed. According to the bill of lading, the goods were to be delivered "from the ship's tackle," and in terms of that bill of lading the defendants were bound to have given us an opportunity of taking delivery in that way.

[GARTH, *C.J.*:—You paid wharfage and godown rent, and so appear to have acquiesced in the goods being landed as they were.]

We say that the duty of the defendants as carriers had not ceased on the goods being landed in the godown. As to acquiescence on our part we had no option. The ship, contrary to her usual custom, on her arrival, came at once alongside the wharf, and it was impossible for us then to insist on taking delivery in the stream from the ship's side. Even supposing that we did acquiesce, our acquiescence went no farther than this, that we consented to allow the defendants to land the goods, for their own convenience but at their own risk. They were bound to keep

the goods landed a reasonable time at their own risk.—*Bourne* vs. *Gatliff*, 11 Clk. and Fin., 45.

In the case of the *Hongkong Bank* vs. *Baker*, 7 Bom. H. C. R., 186, it was decided that the defendant was a common carrier, and that the proviso in the bill of lading, excepting liability from fire, applied to the goods landed. That case appears to be against me, but the facts do not apply, as in this case there was a stipulation that delivery should be taken from the ship's tackle.

[PONTIFEX, *J.*:—I can't see why the exception as to fire does not apply to land as well as sea, as long as the goods are in the hands of the ship. Your bill of lading must have been intended to have some application to goods landed, as there is a proviso for land carriage directly after the proviso for fire.]

The consent to the goods being landed was entirely for the benefit of the defendants, and they ought to be responsible.

[PONTIFEX, *J.*:—The word "accident" in another proviso is against you, for if "fire" is to apply to fire on board ship, why should not "accident" cover the loss by fire in the godown.]

In *Morewood* vs. *Pollok*, 1 Ell. and Bl., 743, fire would have been required to have been specially mentioned, but for the Act,—(26 Geo. III, c. 86, section 2), and therefore would not have been included in "accident."

Unless the defendants can be shown to be warehousemen, we are entitled to recover, and as they cannot be called warehousemen but carriers, the proviso in the bill of lading does not apply.

Evans (for the Respondents) was not called upon.

The following judgment of the Court (1) was delivered by

GARTH, *C.J.*:— GARTH, *C.J.*

We think there is no ground for this appeal.

In order to make the defendants liable for the loss of the goods in question, it should have been shown that the defendants had no right to land them upon the godowns. Perhaps Mr. Bell may be justified in saying that by the terms of the bill of lading the defendants were bound to give the plaintiffs the

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option of landing the goods "from the ship's tackle;" and that they had no right to land them at the godown, without giving the plaintiffs that option.

But then, we think it clear from the evidence that the plaintiffs consented to the goods being landed at the godowns.

It appears, that when once the ship had been placed alongside the wharf, the goods could not have been landed from the "ship's tackle," according to the proper meaning of that expression; and that the only way to land them then was at the godowns; and the plaintiffs evidently consented to this course, because they paid without objection a sum for wharfage, &c., which we cannot doubt was a charge made by the defendants for the use of the godowns.

The plaintiffs are, therefore, placed in this position:—Either the placing these goods in the godowns was a part of the defendant's duty under the contract of carriage, in which case we think they would be protected under the clause in the bill of lading, providing against loss by fire as much as if the fire had occurred on board ship; or, when the goods were placed in the godowns with the consent of the plaintiffs, the defendants had the charge of them as wharfingers, which is the view which we are disposed to take of their true position;—and in this case, it being conceded that the goods were destroyed by fire *without any fault on the part of the defendants*, the latter are not responsible.

We think, therefore, that the appeal should be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

SHEIKH ELAHI BUKSH AND OTHERS . . . . . (PLAINTIFFS) APPELLANTS;

AND

MUSSAMUT MORACHOO AND OTHERS . . . . . (DEFENDANTS) RESPONDENTS.

1879 *Feb.* 19*th*.

No. 211 of 1878.

Appeal—Suit brought under Act VIII *of* 1859—*Act* X *of* 1877, *sections* 556, 558 *and* 588 *(v.)*

A suit was instituted in September 1877, when Act VIII of 1859 was in operation, and a decree was passed on the 2nd February 1878 after the repeal of that Act. An appeal was preferred, but on coming on for hearing was dismissed for default, on the 31st of May, neither the appellants nor their pleader having appeared. On the 21st June, the appellants applied, under section 558 of Act X of 1877, to have the appeal restored, on the ground that the pleader whom they had engaged was a lunatic, and that having engaged a pleader they had thought it unnecessary to appear in person. The Judge rejected the application, and the applicants now appealed against the order rejecting this application. *Held*, that the order of the 21st of June was made under Act X of 1877, and was therefore open to appeal under section 588(*v.*) of that Act.

Runjit Singh vs. *Meharban Koer*, 2 C. L. R., 391, and *Burkut Hossein* vs. *Majidoonnissa*, 3 C. L. R., 208, cited and distinguished.

APPEAL from an Order passed by the Judge of Zillah Shahabad.

Mr. *M. L. Sandel*, for Appellants.

Baboo *Durga Pershad*, for Respondents.

The facts of this case are sufficiently set forth in the judgment of the High Court(1), which was as follows :—

In this case the suit was instituted when Act VIII of 1859 was in operation, namely, in September 1877, and a decree was passed after that Act was repealed and the new Code of Procedure

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was in operation, namely, on the 2nd of February 1878. An appeal against that decree was made, and on that appeal coming on to be heard, neither the appellant nor his pleader appeared, and the appeal was dismissed. The Judge, who dismissed the appeal, stated when he did so that he was aware that the appellants' pleader was a lunatic.

The appellants afterwards applied to have their appeal restored, but the Judge, giving no reasons, rejected the application. The appellants in this application had stated that having engaged a pleader they felt secure, and did not think it necessary to appear in person. The order dismissing the appeal in the first instance was made on the 31st of May 1878, and it is stated by the Judge that it was made under section 556 of Act X of 1877. The application for its restoration was made under section 558 on the 21st of June 1878. The applicants now appeal from the order rejecting this application, and section 588, clause *(v)*, if the new Code of Procedure applies to the case, allows them to appeal.

It is contended, however, by the respondents that as the suit was instituted under the Act of 1859, that Code, and not Act X of 1877, applies to the case: and that as it has been held (*Amir-ruddin* vs. *Jiban Bebee*, 1 B. L. R., Full Bench Rulings, 101) that an order made under similar circumstances was not under section 347 of the Act of 1859 appealable, no appeal now lies from the order of the Judge refusing to re-admit the appeal. In support of this contention the case of *Runjit Singh* vs. *Meharban Koer*, reported in 2 C. L. R., p. 391, was cited. It was there held by a Full Bench that proceedings already commenced when the new Code of Civil Procedure came into operation, were saved by the 6th section of Act I of 1868; and that an appeal allowed by the Code of 1859 in such proceedings is not taken away by anything in the Code of 1877.

It was further held in the case of *Surrendro Nath Pal Chowdhry* vs. *Chunder Coomar Roy*, No. 323 of 1877, (one of the cases under consideration by the Full Bench) that the provisions of Chapter XLIII of the new Code are inapplicable to orders made before 1st October 1877, and do not give an appeal against such orders where an appeal was not allowed under the repealed Code of Procedure.

This case is not directly governed by the Full Bench decision on either point. Here we have a suit instituted under Act VIII of 1859, but decided in the Court of First Instance after the repeal of that Act. So far it was undoubtedly governed by the Code of 1859. But the appeal was presented after the repeal of that Code; and therefore the provisions of section 3 of the Code of 1877, by expressly excepting appeals presented before the new Code came into operation, distinctly indicate that the procedure in this appeal is to be governed by the law of procedure in force at the date of presentation.

According to this law, section 556, an appeal may be dismissed for default. Under section 558 the appellant may apply for its re-admission, and by section 588 (*v.*) he is entitled to an appeal on refusal.

Although the Full Bench decided that an appeal, allowed by the old Code in proceedings originated while it was in force, is not taken away by the repeal thereof, it does not follow that a further appeal may not be allowed under the Code of 1877, if the procedure of the new Code is applicable to such proceedings.

It is not, in our opinion, open to a party to say that by the institution of a suit before 1st October 1877 he has acquired a right to have the proceedings stopped at a certain point, notwithstanding provisions in the new Code for further proceedings in cases governed by it; because it has been held that there is a right to carry proceedings, dating back before 1st October 1877, beyond the stage at which they must stop under the Act of 1877. The Courts will, as a rule, grant the fullest enquiry and most complete remedy they can grant. Their action, if limited, must be limited by express words, and whenever a reasonable construction of the law will admit of granting the remedy, it will be granted.

This case differs from that reported in 3 C. L. R., 208—*Burkut Hossein* vs. *Majidoonnissa*. In that case there was an application pending on the 1st of October 1877, which had been pending for some months. If the order made thereon had been made on or before the 30th September, it would have been final under an express provision of Act VIII of 1859. We held that section 6 of Act I of 1868 operated to keep in force the rules laid down

1879

SHEIKH ELAHI BUKSH v. MUSSAMUT MORACHOO.

Judgment.

in Act VIII, so that the order, though of later date than the repeal of that Act, must be taken as made under it; and that consequently the appeal allowable by the new Code against similar orders, being limited to orders actually made under the provisions of this latter Code, was not available.

In this case there was nothing pending in the lower Appellate Court on the 1st of October 1877, and the application to the Judge of the 21st June 1878 was after that which now stands as the final decree in the suit, namely, the dismissal of the appeal and confirmation of the decree of the first Court on the 31st May preceding.

It seems to us that the order of the 21st June 1878 was made under the Code of 1877, and is therefore open to appeal. Then unquestionably the order of the Judge was wrong, for he himself gives a good reason why the appeal should have been reinstated, and none against it.

The appeal will, therefore, be allowed with costs, and the Judge will be directed to re-admit the appeal.

[REFERENCE FROM BOARD OF REVENUE.]

IN THE MATTER OF THE UNCOVENANTED SERVICE BANK, LIMITED.

1879. *Feb. 18th.*

Stamp Act, XVIII *of* 1869, *section* 15 *and Sch.* II, *Art.* 7—*Receipt or discharge.*

A memorandum purporting that a sum of money has been received by a Bank from a person, other than a constituent of such Bank, to be credited to a constituent's account, and furnished by the Bank for transmission to such constituent, is not a receipt or discharge given for or upon payment of money in satisfaction of a debt within the meaning of Art. 7 of Act XVIII of 1869, Sch. II., and is not chargeable with stamp duty.

THIS was a reference from the North-Western Provinces and Oudh under section 41 of Act XVIII of 1869, as to whether a certain memorandum furnished by the Uncovenanted Service Bank, Naini Tal, to Mr. J. G. Robertson, for transmission to Captain H. Cotton, requires, under clause 7, schedule II of the General Stamp Act, to be stamped with a one-anna adhesive stamp. The memorandum was as follows:—" Uncovenanted Service Bank, Limited, Office. Memo. for Captain H. Cotton. By amount received from J. Robertson, Esq., to credit your account Rs. 300 (three hundred only), Naini Tal, 14th October 1878."

The Board of Revenue was of opinion that, as the document purports to be a memorandum, that the Bank has received from a person, *other than its constituent,* a sum of money to be credited to a constituent's account, as such, it falls under the proviso to clause 2, section 15 of the Act, inasmuch as "it expresses to have received money *of* or by the hands of a *person other than the one to whom the money is to be accounted for,*" and that this being the case it is liable to a one-anna stamp.

1879

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Upon the reference the High Court (1) delivered the following judgment:—

We think that the Board of Revenue, North-Western Provinces, have not taken a correct view of the provisions of the Stamp Act.

Before we look at section 15 to see what instruments under the head of "receipts" are *exempt from duty*, we must first look to schedule II, to see whether the instrument in question is by section 4 *chargeable with duty*. It could only be chargeable under article 7, if it were "a receipt or discharge given for or upon the payment of money *in satisfaction of a debt*." If, therefore, the Rs. 300 was paid in this instance by Mr. Robertson to Captain Cotton's account, otherwise than in satisfaction of a debt, it would not be chargeable at all; and we find nothing in the facts stated, or upon the instrument itself, to show that it was paid in satisfaction of a debt. But even assuming that it was so paid, we consider that the document in question was not a "receipt or discharge" within the meaning of the Act, because it was not given to the party who paid the money.

In this instance, no receipt appears to have been given to Mr. Robertson, and the document in question is nothing more than the ordinary intimation which the Bank gives to its customer, that a certain sum has been paid in by Mr. Robertson to his credit.

If the instrument in question were a receipt within the meaning of article 7, then in a case where it would be proper for the Bank to give notice of a particular payment to several different people, each one of the notices so given would have to be stamped as a receipt.

It seems to us perfectly clear that this was never the intention of the Stamp Act, and for these reasons we are of opinion that the instrument in question is not chargeable with any stamp duty.

(1) GARTH, *C.J.*, JACKSON and PONTIFEX, *J.J.*

[CRIMINAL MOTION.]

IN RE FATA IYAH KHAN . . . . . PETITIONER.

1879 *Jan. 31st.*

No. 2 of 1879.

Criminal Procedure Code, section 471—Cases exclusively triable by Sessions Court—Indian Penal Code, section 193.

It is only in cases exclusively triable by a Court of Sessions, that such Court has power to commit, or hold to bail and try an accused person charged with the offences mentioned in sections 467, 468 and 469 of the Code of Criminal Procedure.

The words "commit the case itself," occurring in section 471, do not empower a Court of Sessions to commit to itself a person charged with giving false evidence before it, under section 193 of the Indian Penal Code.

THE facts of this case are set out in the following judgment of the High Court (1) :—

In this case the Sessions Judge of Burdwan has committed the petitioner before us to take his trial before the Court of Sessions on a charge of having given false evidence in a stage of a judicial proceeding, viz., a trial held in the Court of Sessions, under section 193 of the Indian Penal Code. The Sessions Judge has himself held the preliminary enquiry and committed the case to the Court of Sessions.

We are asked to set aside this commitment as made in contravention of the provisions of the Code of Criminal Procedure. The Sessions Judge, in the explanation which he has submitted, states that in his opinion section 471 empowers him to commit this case, and that that power is not limited or restricted by the provisions of the following section 472. We think that the learned Judge has taken an erroneous view of the law, and that the interpretation he would put upon these sections cannot be supported. The offence with which Fata Iyah Khan is charged is admittedly not one that is triable by the Court of Sessions

(1) BIRCH and MITTER, *J.J.*

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exclusively. It is only in cases exclusively triable by the Court of Sessions that the Judge is empowered to commit or hold to bail and try an accused person charged with the offences mentioned in sections 467, 468, and 469. In cases of a light nature, which are not triable by the Court of Sessions exclusively, all that the Judge is empowered to do is to send the case for enquiry to any Magistrate having power to try or commit for trial the accused person under section 471. The words "commit the case itself," occurring in section 471, do not mean that the Court of Sessions may commit the case to itself, as the Judge would interpret. If the section would bear this interpretation, it would be opposed to the distinct provisions of section 231 which restricts and limits the action of the Court of Sessions as a Court of Original Criminal Jurisdiction, save and except in the cases provided for by sections 435 and 472.

We are of opinion that the procedure adopted by the Sessions Judge in this case is not warranted by law, and we therefore quash the commitment to the Court of Sessions, and direct the Sessions Judge to send the case for enquiry to the Magistrate who will deal with it as he thinks fit.

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Breach of Contract—*continued.*
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Common Object—*Unlawful Assembly—Prosecution of the Common Object—Penal Code, section* 149—*Act XLV of* 1860, *section* 149.] If a body of men armed with *latties*, and under the leadership of one who, to the knowledge of the rest, is armed with a gun, assemble for the purpose of forcibly carrying off another man's property; and if, in effecting that purpose, any one of the party, taking the gun, shoots and kills the person who is making a lawful resistance, the whole party may properly be convicted of murder under section 149 of the Indian Penal Code. THE QUEEN vs. SABID ALI, 20 W. R., Crim., 5, cited. HARI SING vs. THE EMPRESS OF INDIA 49

Compensation—*Ejectment—Building on land belonging to another*—Bona-fides.] Where a man builds on land belonging to another, he will not, when ejected, be allowed any compensation for the buildings, unless the circumstances show that he built in good faith, believing the land to be his own. BANI MADHUB DASS vs. RAMJOY ROKH, 1 B. L. R., A. C., 213; RANI RAMA vs. JAN MAHOMED, 3 B. L. R., A. C., 18; BROMO MOYE DEBEA vs. KOOMOODINEE KANT

Compensation—*continued.*
BANERJEE, 17 W. R., 467; and BANI MADHUB BANERJEE vs. JAI KRISHNA MOOKERJEE, 7 B. L R., 152; 12 W. R, 495. FURZUND ALI KHAN vs. AKA ALI MAHOMED 194

Condition Precedent—*Shipping Order—Contract—Construction of Contract—Notice to Ship—Refusal to Ship.*] Plaintiffs let to the defendants, in Calcutta, a portion of the tonnage of a vessel for a voyage from Calcutta to London. The vessel was then at sea bound for Calcutta, and the shipping order, which was dated the 16th of February 1877, and which formed the contract between the parties, stated that the defendants had taken a certain amount of the tonnage for a voyage to London in the "*Hooper*, S.S., to arrive after the completion of two country voyages," on notice in May or June 1877. After the ship arrived in Calcutta, and after the completion of one country voyage of more than usual length, plaintiffs gave notice to the defendants to ship, but this the latter declined to do, on the ground that they were not bound to perform their part of the contract until the ship had made two country voyages. *Held*, (affirming the decision of PONTIFEX, *J.*,) that the clause "after the completion of two country voyages," was a condition precedent, and that the defendants were justified in refusing to ship until that condition had been performed. GLAHOLM vs. HAYS, 2 M. & G., 257; OLLIVE vs. BOOKER, 1 Exch., 406; OLIVER vs. FIELDEN, 4 Exch., 155; TYERS vs. FERRYHILL IRON CO., L. R., 10 Exch., 195; and BOWES vs. SHAND, 2 App. Cas., 455, cited. JAMES NICOL FLEMING vs. CHARLES KOEGLER 297

Confession of Accomplice.—*Accomplice—Evidence Act, section 30—Court—Jury—Joint trial—Corroborative Evidence.*] Under section 30 of the Evidence Act, the confession of a prisoner which affects himself and some other prisoner tried for the same offence at the same time becomes, when duly proved, admissible in evidence as against both prisoners, and must be dealt with by the Court. Where A and B are being jointly tried for the same offence, and the only evidence against B is the confession of A, B should be acquitted, as his conviction upon such evidence would be illegal. The word "Court" in section 30 of the Evidence Act means the Court before which the trial of the prisoner is to be had, and in a Jury trial, means the Judge and Jury. *Per* JACKSON, MARKBY, AINSLIE, and MCDONELL, *J.J.*—The corroborative evidence which, coupled with the confession of an alleged accomplice, would be sufficient to sustain the conviction of a prisoner, must be such as would itself, if believed, be sufficient for conviction. *Per* GARTH, *C.J.*—How far any corroborative evidence would be sufficient, coupled with the confession of an accomplice, to convict a prisoner, must depend upon the circumstances of each particular case, and is a question for the Judge who tries it. ASHUTOSH CHUCKERBUTTY, IN THE MATTER OF 270

Consideration. See EXPIRED DECREE ... 554

Conspiracy. See ABETMENT 81

Construction of Contract. See CONDITION PRECEDENT 297

Construction of Contract—*Measurement of Land—Landlord and Tenant—Kabuliat—Agreement to measure.*] A granted a lease of certain land to B at a certain rate per beegah. It was agreed that the quantity of land should be taken as 7,000 beegahs until measurement, and that when measured the total rent should be increased or diminished according as the quantity of land was more or less than 7,000 beegahs. Subsequently, in a suit between A and B, in which the quantity of land was not a material issue, the land was measured at A's instance and found to contain 9,000 beegahs. *Held*, in a subsequent suit for the increased rent, that that was not such a measurement as was contemplated by the parties; and that A could not bring a suit on the agreement on the basis of that measurement. EKRAM MUNDLE vs. HULLODHUR PAL, I. L. R., 3 Cal., 271, cited and followed. RAJA LUCHMUN PERSHAD GORGO vs. LUKHUN CHURN KUR 74

Contribution. See LIMITATION 420

Co-parcenary. See PRESUMPTIONS ... 97

Co-partner—*Revenue Sale—Default in payment of Revenue—Act XI of 1859, section 53.*] Plaintiff purchased at an auction-sale in the Civil Court certain mouzahs held by the owner of a revenue-paying estate. Before the sale was confirmed, default was made in the payment of revenue, and a mehal (of which the villages formed part) was sold by the Collector and purchased by the plaintiff, the sale taking place after the purchase of the mouzahs had been confirmed. *Held*, that the plaintiff was a co-partner within the meaning of section 53 of Act XI of 1859, and that he took his purchase subject to all existing incumbrances. ABDOOL BARI vs. RAM DASS KOONDOO 223

Co-sharer of Judgment-debtor. See EXECUTION OF DECREE 227

Contribution. See MERGER ... ... 18[illegible]

Co-sharer. See PRE-EMPTION ... ... 18[illegible]

——— **Suit by**. See ENHANCEMENT OF RENT ... ... [illegible]

Co-sharers made Defendants. See ENHANCEMENT OF RENT ... ... [illegible]

Construction of Deed of Gift. See JURISDICTION ... ... [illegible]

Contract, Performance of. See JURISDICTION ... ... [illegible]

Contract. See CONDITION PRECEDENT ... [illegible]

Contract Act, section 25. See EXPIRED DECREE 554

Contract Act (IX of 1872), section 44—*Release of one of several partners.*] Under section 44 of the Contract Act, a release of one of several partners, jointly liable upon a contract, does not discharge from liability the other partners who are not parties to the agreement by which such release is granted. KIRTEE CHUNDER MITTER vs. G. M. STRUTHERS 546

Contract Act, section 178—*Possession of Goods—Servant in charge of House—Trover—Pawnbroker—Pledge of Goods.*] The owner of a house, on leaving Calcutta, left a jemadar in charge of her house and property there, as her servant. During her absence, the jemadar removed some valuables from the house and pawned them. *Held*, that the owner could recover in trover against the pawnbrokers, as the goods had not been in the "possession" of the pledgor, within the meaning of section 178 of the Contract Act. *Held*, also, that, even supposing the articles were in "possession" of the jemadar within the meaning of section 178 of the Contract Act, yet the case came clearly within the proviso to that section. GREENWOOD vs. HOLQUETTE, 12 B. L. R., 42, cited and followed. SIDDOMOYE DABEE CHOWDHRANEE vs. SITTARAM AGURWALLAH and TOOBUL DASS MULLICK 398

Construction of Contract. See APPROPRIATION OF PAYMENTS 361

Convicted Person. See CODE OF CRIMINAL PROCEDURE, SECTION 308 404

Conviction. See CRIMINAL PROCEDURE CODE, SECTION 273 511

Corroborative Evidence. See CONFESSION OF ACCOMPLICE 270

Correct Copy. See PLAINT, FORM OF ... 509

Costs. See RENT SUIT 504

——**of Appeal.** See DIVORCE... ... 484

——**paid under reversed Decree.** See RESTITUTION 358

Court. See CONFESSION OF ACCOMPLICE... 270

——**of Co-ordinate Jurisdiction.** See INJUNCTION... 421

——**Fees' Act.** See ACT VII OF 1870. 13

Custom. See RES JUDICATA 31

Creditor. See ESTOPPEL 154

Code of Criminal Procedure. See ACT X OF 1872 87

——————— See ACT VIII OF 1859. See ACT X OF 1877 ... 25

——————— **section 308**—*Bail—Convicted person—Prisoner—Fine—Joint Fine.*] The proper course of procedure under section 308 of the Code of Criminal Procedure is to impose a fine, and out of the fine realized to direct payment to the complainant of such amount as the Court thinks fit, having regard to the provisions of the section. A Court of Session, acting under section 296 of the Code of Criminal Procedure, has no power to admit a convicted person to bail. KANHAI SAHU'S CASE, 23 W. R., Crim., 40, cited and followed. MOHESH MUNDUL vs. BHOLANATH MUNDUL... ... 404

——————— **section 297, clause 6.** See INDIAN PENAL CODE, SECTION 193 527

——————— **273**—*Distinct Offences—Conviction—Appeal.*] Where a person is charged with two separate offences in one trial, the amount of the whole punishment awarded for the two offences must be regarded as one sentence for the purpose of determining whether an appeal lies under section 273 of the Code of Criminal Procedure or not. THE EMPRESS *v.* HARADHUN TAMULI ... 511

——————— **471**—*Cases exclusively triable by Sessions Court—Indian Penal Code, section* 193.] It is only in cases exclusively triable by a Court of Sessions, that such Court has power to commit, or hold to bail and try an accused person charged with the offences mentioned in sections 467, 468 and 469 of the Code of Criminal Procedure. The words "commit the case itself," occurring in section 471, do not empower a Court of Sessions to commit to itself a person charged with giving false evidence before it, under section 193 of the Indian Penal Code. *In re* FATU IYAH KHAN ... 599

——————— **530.** See NOTICE 551

Daughter's Estate. See HINDU LAW ... 465

Damages—*Settlement out of Court—Execution of Decree—Act X of* 1877, *sec.* 258.] A decree-holder, who, although he has settled with his judgment-debtor out of Court, yet nevertheless sues out execution against him, will be liable to an action for damages at the hands of the judgment-debtor. Sections 244 or 258 of Act X of 1877 have made no change in the law in this respect. GUNI KHAN vs. KOONJO BEHARY SEIN 414

——— See BREACH OF CONTRACT ... 287

——— See SPECIAL APPEAL 177

Debts of Ancestor. See SALE IN EXECUTION OF DECREE 473

——**Deceased.** See ESTOPPEL ... 154

Death of Appellant. See LIMITATION... 440

Debutter. See ENDOWMENT 112

Defamation—*Good faith—Onus—Indian Penal Code, section* 499—*Act XVIII of* 1862, *section* 27.] In the mofussil, if an accused person is proved to have committed what *primâ facie*

Defamation—*continued.*
amounts to defamation, the *onus* is on him to show that his case comes within some one or more of the general exceptions to section 499 of the Indian Penal Code. *Semble*, that if a man is tried for defamation in the Original Criminal Jurisdiction of the High Court, it will be assumed that he acted in good faith until the contrary is proved. Otherwise in the mofussil. Act XVIII of 1862, section 27, does not extend to the Mofussil Courts. R. vs. KIKABBAI PARBHUDAS, 9 Bom. H. C. R., 451. IN THE MATTER OF SHIBOO PROSHAD PANDAH 122

Decree against a dead man. See EXECUTION OF DECREE 192

Decree declaring lien. See LIS PENDENS 396

Decree, Execution of. See DAMAGES ... 414

——————— See APPEAL ... 437

Decree, Setting aside. See FRAUD ... 17

Default in Payment of Revenue. See CO-PARTNER 228

Defendant dying before Decree. See EXECUTION OF DECREE 192

Demand. See LIMITATION 336

Dena-pawna. See INJUNCTION 421

Devise, Assignee by. See ACT XXVII of 1860 462

Devise to a Class. See VOID BEQUEST... 315

Desertion. See DIVORCE 484

Dewan. See INQUIRY 87

——— See JURISDICTION 258

Discharge of Accused. See INTERPRETATION 263

Dispossession. See LIMITATION ... 105

Distinct Offences. See CRIMINAL PROCEDURE CODE, SECTION 273 518

District Court. See INSOLVENCY ... 501

Divorce—*Act IV of* 1869—*Desertion—Abandonment—Wife, Separation against wish of—Alimony—Costs of Appeal.*] Where there has been a voluntary separation between husband and wife, there can be no desertion of the wife by the husband, unless there shall have been a resumption of intercourse, or, the wife shall have taken active steps to make the renewal of such intercourse possible or practicable. WOOD vs. WOOD, 1 C. L. Rep., 552, distinguished. In a suit for divorce, a wife, though unsuccessful, is entitled to the costs of an appeal if it be not unreasonably preferred. JONES vs. JONES, L. R., 2 P. and D., 333, followed. FOWLE vs. FOWLE ... 484

Document, Evidence to contradict. See ORAL EVIDENCE... 386

Durputnee. See MESNE PROFITS ... 28

Ejectment. See COMPENSATION 194

Endowment—*Debutter—Appointment of Manager—Removal of Manager—Manager.*] The trustee of an endowment has not, as such, the power of transferring his trust to any other person. And where a trustee is empowered to appoint another trustee to act for him, he cannot transfer the right of exercising that power to another or others. The mode in which a suit for the removal or appointment of a Manager to an endowment not coming within Act XX of 1863, stated. KALI CHURN GIRI vs. GOLABI, 2 C. L. R., 129, followed. RUP NARAIN SINGH vs. JUNKO BYE 112

Enhancement. See UNDER-TENURE, SALE OF 231

——————— See SERVICE OF NOTICE. 359

——————— See INTEREST 383

——————— *Suit for Enhancement under Act VIII of* 1859—*Buildings—Notice—Act VIII (B.C.) of* 1869, *section* 14.] Plaintiff having served notice of enhancement, in terms of section 14 of the Rent Act, VIII (B.C.) of 1869, of certain lands held by defendants on which reservoirs and buildings, for the purposes of a silk filature, had been constructed, brought a suit for such enhancement under Act VIII of 1859. The lower Court dismissed the suit, in spite of a statement in the plaint that the suit was brought under the latter Act on the ground that the rent of the tenure was not enhanceable under the Rent Law. *Held*, that the lower Court ought not to have refused to decide the suit in the form in which it was brought, but ought to have inquired as to the nature of the tenancy, whether it was held at a fixed rate or not. *Held*, further, that although the suit was brought under the general law of Procedure, the notice was not vitiated by the fact that the reasons assigned for the enhancement were reasons taken from the Rent Law applicable to the case of ryots possessing rights of occupancy. COOMAR PORESH NARAIN ROY vs. ROBERT WATSON & CO. ... 543

Enhancement of Rent—*Suit by co-sharer—Payment of rent separately—Co-sharers made Defendants.*] A suit by the owner of an undivided share to enhance the rent of a jote, the tenant of which has been in the habit of paying his rent to each sharer separately, will not lie, even though plaintiff's co-sharers be made defendants to the suit. RAJENDRO NARAIN BISWAS vs. MOHENDRO LALL MITTER 21

Entry in Hathchitta. See STAMP ACT XVIII OF 1869, SCH. II., SECTION 5 ... 53

Equity of Redemption. See MORTGAGE 18

Error of Law. See CHARTER ACT ... 18

Estoppel. See BENAMEE 6

——— See FRAUD 1

Estoppel—*Legal Representative—Creditor—Debts of deceased—Party to Suit.*] If the sole legal representative of a deceased Hindu knowingly permits a stranger to continue in possession of the deceased's property as his widow, and suffers a creditor of the deceased to sue the woman and get a decree against her under the belief that she is the representative of the deceased, he will not, as against the decree-holder, be allowed to say that the property of the deceased, which had been in the stranger's possession, is not liable to be taken in execution of the decree. MIR ASHRUF ALI vs. ROY LUCHMIPUT SINGH, 2 C. L. R., 223, *cited.* PROSUNNO CHUNDER BHUTTACHARJEE vs. KRISTO CHURN PAL 154

2 ———*Notice—Mortgage of Jote—Under-tenure—Sale of Tenure—Foreclosure—Registration—Execution of Decree—Possession—Transfer of names—Act VIII (B.C.) of 1869, section 26.*] When the mortgagee of a jote obtains a foreclosure decree, it is his duty, under section 26, Act VIII (B.C.) of 1869, to have his name registered in the lessor's sherishta. A, the holder of a transferable jote, mortgaged his interest to B. Subsequently A's landlord having obtained rent decrees against A for the rent of two successive years, sold and purchased A's right, title and interest in the jote in execution of one of the decrees, and entered into possession. Thereupon B, who had previously foreclosed his mortgage, brought a suit for possession against A and his landlord, and obtained a decree, in execution of which he got into possession. Subsequently, the landlord, in execution of the second rent decree, obtained against A, sold and purchased the tenure itself, of which B was then in possession. *Held*, that the landlord was entitled to possession of the tenure as against B; and that, under the circumstances, he was not bound to give B formal notice of the second decree. NOBIN KISHEN MOOKERJEE vs. SHIB PERSHAD PATTUCK, 8 W. R., 96, considered. ROBERT WATSON & CO. vs. GONESH CHUNDER SHAOO and KHETTER MOHUN BEEHOYE 240

Evidence. See HINDU WIDOW, DECREE AGAINST 530

Evidence Act (I) of 1872, section 92. See ORAL EVIDENCE... 386

Evidence to be recorded. See SECURITY TO KEEP THE PEACE 72

Examination of Witness. See PRACTICE 93

——————— See INTERPRETATION 263

Execution of Decree. See LIMITATION 261

——————— See DAMAGES ... 414

——————— See APPEAL ... 437

——————— See ACT VIII OF 1859, SECTION 204 505

——————— See ESTOPPEL ... 239

——————— See LIMITATION 189

Execution of Decree. See LIMITATION 572

——————— See LIMITATION 166

——————— See SMALL CAUSE COURT (MOFUSSIL) ACT XI OF 1865, SECTION 20 558

——————— See FRAUD... ... 17

——————— See LIMITATION ... 25

——————— See LIMITATION ... 46

——————— See ORDER MADE UNDER ACT VIII OF 1859 208

———*Small Cause Court—Jurisdiction—Transfer of Decree for Execution—Act X of 1877, section 268—Act XI of 1865, section 20.*] Except in the manner allowed by section 20, Act XI of 1865, the Judge of a Small Cause Court cannot now send a decree of his own Court for execution by another Court, nor can he issue an order under section 268, Act X of 1877, out of his own jurisdiction. MOONSHEE HOSSEIN ALLI vs. ASHOOTOSH GANGOOLLY 30

2 ———*Transferable Tenure—Arrears of Rent—Act VIII of 1859, section 246—Act VIII (B.C.) of 1869, section 63.*] A, the lessee of a transferable tenure, transferred his interest to B, but after the transfer, the name of A remained as registered tenant. Subsequently the zemindar brought a suit against A for arrears of rent which accrued due partly before and partly after the purchase, and obtained a decree for the sale of the tenure. *Held*, that that decree might be executed against the tenure, though the latter was in B's possession before it was passed, it not appearing that the zemindar had knowledge of the transfer before the date of the decree. A suit will lie to set aside an order passed under section 63 of Act VIII (B C.) of 1869. Where property has been released from attachment in execution of a decree, and in a subsequent suit brought for the purpose, a decree is obtained, declaring it liable to be attached and sold in execution of the former decree, the effect of the decree in the latter suit is to set aside the order which released the property from attachment, thus leaving matters as they were before that order was passed. SHEIK AFZUL ALI vs. LALLA GURNARAIN, 6 W R., Act X, 59; URJOON SAHOY vs. NILMONEY SINGH, 20 W. R., 90; NOBIN CHUNDER SEN vs. NOBIN CHUNDER CHUCKERBUTTY, 22 W. R., 46; cited. WOOMA CHURN CHATTERJEA vs. KADAMBINI DEBEE... 146

3 ———*Defendant dying before decree—Representatives—Decree against a dead man—Act VIII of 1859, section 119.*] Where the sole defendant to a suit dies before decree, a decree passed against him on the supposition of his being still alive, is incapable of being executed. Cases falling under Act VIII of 1859, section 119, stated. ROOP NARAIN SINGH vs. RAMAYEE SINGH 192

4 ———*Co-sharer of Judgment-debtor—Execution by Co-sharer.*] A mortgaged

Execution of Decree—*continued.*
certain property to B, and afterwards sold a two-annas share thereof to C, and gave him an *ijara* of a portion. B obtained a decree on his mortgage, which decree was purchased by C, who then applied for execution. The judgment-debtor, A, objected that C was not competent to take out execution, being a co-sharer and an ijaradar, but this contention was over-ruled. KALLY DASS BHADURY vs. GOLAM ALLY CHOWDRY 237

Execution delayed by Decree-holder. See INTEREST UPON DECREE 523

Execution of part of Decree. See JOINT DECREE 513

Execution Sale—*Arrears of Rent—Act VIII (B.C.) of 1869, section 9—Act VIII of 1859—Right, Title and Interest.*] A and his three sisters were joint owners of a certain mouzah, the former holding 7 annas 7 pie and 4 krants, and the latter together 8 annas 4 pie 16 krants of the 16 annas of the estate. In execution of a decree obtained against A, his right, title and interest in the mouzah was sold to B. The zemindar then brought a suit under Act VIII (B.C.) of 1869, against A, for arrears of rent in respect of the mouzah and obtained a decree in execution of which he applied not for a sale of the tenure as he might have done under section 50 of that Act, but for "attachment and sale of the judgment-debtor's property." Upon this application, orders for sale were issued under Act VIII of 1859. The sale notification was headed "under section 246 of Act VIII of 1859," and notified the sale of the rights and interests only of the judgment-debtor. At this sale C became the purchaser and was put in possession of the mouzah. Thereupon B, the purchaser at the first execution sale, and a third person D, who had meanwhile purchased the share of A's sisters, sued C for possession. *Held*, that B and D were entitled to possession, for that C had acquired nothing under his purchase. DOOLAR CHAND SAHOO vs. LALL CHABEEL CHAND; DOOLAR CHAND SAHOO vs LALL BISHESHUR DYAL 561

Ex-parte Decree. See SMALL CAUSE COURT ACT (MOFUSSIL), SECTION 21 482

Expenditure on faith of good title. See FRAUD 1

Expired Decree—*Instalment Bond by Judgment-debtor—Consideration—Contract Act, section 25.*] In November 1864, plaintiff instituted proceedings in execution of a decree obtained by him in 1859. While such proceedings were pending, no question of limitation having been raised, the judgment-debtor filed in Court a deed of compromise, by which she admitted a certain sum to be due and agreed to pay off the debt by instalments, there being a condition in the deed that on default being made the whole amount due should be recovered by execution of the de-

Expired Decree—*continued.*
cree. Default was made, and the plaintiff attempted, in terms of the compromise, to execute the decree against the representatives of the judgment-debtor, but it was held this suit in execution was barred, as the decree had been dead at the time of the compromise, and could not be revived by any agreement between the parties. The plaintiff thereupon brought a suit upon the compromise as a distinct contract, to recover the balance due thereunder. *Held*, that, although the decree was barred at the time of the compromise, the principle laid down by section 25 of the Contract Act was not new in India, and that the compromise was a valid contract, and enforceable by suit. HEERA LALL MUKHOPADHYA vs. ROY DHUNPUT SINGH BAHADOOR 554

Failure of Justice. See RE-TRIAL ... 131

False Statement. See CHARTER ACT ... 137

Family Custom. See RES JUDICATA ... 31

Ferry—*Infringement of Right of Ferry—Cause of Action—Injunction.*] Where a right of ferry is settled with a zemindar, the infringement of that right by reason of the establishment of another ferry by a neighbouring proprietor at a short distance will give a cause of action; and the owner of the new ferry will be restrained from carrying over in his boats, whether for hire or otherwise, persons other than his own servants, or persons lawfully engaged upon his business or going to his premises. LUCHMESSUR SINGH vs. LILANUND SINGH 427

Final Decree or Order. See LIMITATION 430

Fine. See CODE OF CRIMINAL PROCEDURE, SECTION 308 404

Foreclosure. See MORTGAGE 184

——— See ESTOPPEL 239

——— See LIMITATION 336

Forfeiture of Recognizance. See RECOGNIZANCE 406

Form of Decree. See FRAUD 17

Forum. See JURISDICTION 459

Frame of Suit. See FRAUD 17

——— See PLAINT, FORM OF 509

Fraud—*Estoppel—Owner of land standing by—Bonâ fide possessor—Expenditure on faith of good title.*] In order to prevent the owner of land,—who is charged with standing by and allowing another person, who believes he has a good title thereto, to enter on the land and spend money in improving it,—from recovering possession thereof, fraud and deceit on the part of the owner must be clearly proved. DANN vs. SPURRIER, 7 Vesey, 251; and RANEE RAMA vs. JAN MAHOMED, 11 W. R., 574, explained. LAMOLOIS vs. RATTRAY 3

Fraud—*continued.*

2 ——*—Sale—Decree—Setting aside decree—Minor—Personal decree—Frame of suit—Form of decree—Party to suit—Execution of decree—Part payment.*] A, "for self and as guardian of C, a minor," brought a suit for debt against B. In that suit, a part payment of the debt by B to A on account of C was suppressed, a personal decree was given against the minor, and, in execution of that decree, certain property belonging to the minor was sold. *Held*, in a subsequent suit by the minor, that the latter was entitled to have the decree and the subsequent sale set aside, as against a purchaser with notice, on the ground of fraud. *Semble*, that the fact of a suit being brought by A, "for self and as guardian of C, a minor," is not conclusive evidence that C is not so far a party to the suit as to be bound by the decree. SREENARAIN MITTER vs. KRISTO SOONDAREE DASSEE, 11 B. L. R., 171, and MONGOLA DASSEE vs. SHOSHEE BHOOSUN KAR, 12 B. L. R., Appendix 2, cited. GRISH CHUNDER MOOKERJEE and TARINEE CHURN CHATTERJEE vs. MILLER 17

Full Bench—*Confession of an accomplice—Accomplice—Evidence Act, section 30—Court—Jury—Joint trial—Corroborative Evidence.*] Under section 30 of the Evidence Act, the confession of a prisoner, which affects himself and some other prisoner tried for the same offence at the same time, becomes, when duly proved, admissible in evidence as against both prisoners, and must be dealt with by the Court. Where A and B are being jointly tried for the same offence, and the only evidence against B is the confession of A, B should be acquitted, as his conviction upon such evidence would be illegal The word "Court" in section 30 of the Evidence Act means the Court before which the trial of the prisoner is to be had, and in a Jury trial, means the Judge and Jury. *Per* JACKSON, MARKBY, AINSLIE, and MCDONELL, *J.J.*—The corroborative evidence which, coupled with the confession of an alleged accomplice, would be sufficient to sustain the conviction of a prisoner, must be such as would itself, if believed, be sufficient for conviction. *Per* GARTH, *C.J.*—How far any corroborative evidence would be sufficient, coupled with the confession of an accomplice, to convict a prisoner, must depend upon the circumstances of each particular case, and is a question for the Judge who tries it. *In the matter of* ASHUTOSH CHUCKERBUTTY ... 270

General and Special Power. See VAKALATNAMAH 13

General Clauses Act, section 6. See APPEAL 437

Gift by Hindu Widow—*Widow—Next heir, Concurrence of—Title—Reversioner.*] A gift by a childless Hindu widow of the estate left by her deceased husband, made with the concurrence of the next heir then living, passes a valid title to the property. RAJBOLLABH SEN vs. OMESH CHUNDRO ROOY 384

Gift, Construction of Deed of. See JURISDICTION 417

Gift, Deed of. See RES JUDICATA ... 265

Gift not followed by Possession—*Loco parentis—Hindu Law—Absolute Gift—Immediate Gift—Possession.*] A Hindu merchant made an absolute and immediate gift of all his property to the widow of his daughter's grandson who lived with him, and in regard to whom he stood in *loco parentis*. It did not appear that the gift had been followed by possession, and the donor continued to carry on the business in his own name, until his death, which happened some two years afterwards. *Held*, that the gift was valid. ANUNCHUND RAI vs. KISHEN MOHUN BUNOJA, 1 Select Reports, p. 152, cited and followed. TARO BEBEE vs. GHASIRAM ... 247

Good Faith. See DEFAMATION 122

Ground of Appeal. See MISCONDUCT OF JUDGE 23

Guarantee. See APPROPRIATION OF PAYMENTS 361

Guardian. See LIMITATION 391

Hathchitta, Entry in. See STAMP ACT XVIII OF 1869, SCH. II., SECTION 5 ... 520

Heir at Law. See ONUS 170

Hereditary Grant. See JURISDICTION ... 417

High Court's Act. See CHARTER ACT ... 137

Hindu Joint Family. See PRESUMPTIONS. 97

Hindu Law. See GIFT NOT FOLLOWED BY POSSESSION 247

——————. See VOID BEQUEST ... 315

——————*—Daughter's Estate—Stridhan—Mitakshara—Jain Law.*] Under Mitakshara Law a daughter takes only a qualified and restricted estate in property inherited from her father, and upon her death the heirs of her father, and not her own heirs are entitled to succeed to such property. Where a custom of the Jains is relied upon, it must be proved like any other custom varying the ordinary law. CHOTAY LALL vs. CHUNNO LALL 465

Hindu Widow. See RES JUDICATA ... 265

——————, **Decree against.** See SALE IN EXECUTION OF DECREE 473

——————————*—Sale Certificate—Evidence—Reversionary Heirs, Right of.*] Where an estate is sold in execution of a decree which in form is a personal decree against a widow, and the sale certificate purports to pass only the right, title and interest of such widow, the purchasers at such sale cannot, in a suit by

Hindu Widow, &c.—*continued.*
the reversionary heirs of the husband for possession of the property, give evidence to show that the debt for which the property was sold was chargeable on the estate of the deceased husband, with a view to establishing a right to more than the widow's interest. BAIJAN DOOBEY vs. BRIJ BHOOKUN LALL AWASTI, L. R., 2, Ind. App., 275, cited. RADHA MOHUN MUNDUL vs. SOSHI BHOOSUN BISWAS 530

Ijara—*Term of years—Renewal of Lease—Right of Occupancy.*] A right of occupancy may be acquired in respect of an undivided share of an estate. Plaintiff re-let certain lands in *ijara* to defendants for a term of five years, from the 12th of April 1865 to the 12th of April 1870. The pottah contained a clause of renewal on the expiration of the term, and a stipulation that the defendants should accept the renewed pottah and give a kabulyat within two months after fixing the rates. After the expiration of the lease the defendants continued in possession, and on the 28th of December 1872, plaintiff issued a notice, calling on the defendants to take the renewed lease at rates mentioned in the notice, and within two months from the date thereof. The plaintiffs refused to take the lease on the ground that the rates were too high; and on the 25th of August 1874, plaintiff brought a suit for possession of the land. *Held*, affirming the judgment of the High Court, the plaintiff had a right to turn the defendants out of possession at the expiration of the term granted by the lease of 1865, except so far as that right was qualified by the stipulation for a renewal; that the defendants at the expiration of that lease had an equitable right to a renewal according to the stipulations in the agreement; that although the defendants were not bound to accept the renewal, if the rent at which the plaintiff offered it were too high, yet in that case it lay upon them to take measures to compel the plaintiff to renew at a proper rate; that the defendants could not compel a renewal of the lease for more than five years, the original term; and that it was too late to rely upon a right of renewal at a time, when, if it had been granted, the renewed lease would have expired. JARDINE, SKINNER & CO. vs. RANI SURUT SOONDARI DEBI 140

Immediate Gift. See GIFT NOT FOLLOWED BY POSSESSION 247

Impartible Property. See RES JUDICATA 31

Imprisonment, Sentence of. See INDIAN PENAL CODE, SECTION 193 527

Indian Companies' Act, X of 1866, section 141. See PRACTICE... 581

——Penal Code, section 108, expls. 2 and 4—*Theft—Removal of Goods with Owner's Permission—Abetment.*] The owners of certain goods having been informed by a servant in their employ of a proposal made to him by the accused that he should join him in removing and converting such goods to their own use, allowed the accused so to remove the goods: In the act of removal the accused was arrested and charged with theft and with having abetted the commission of the offence of theft. *Held*, that no theft had been committed, the goods having been removed with the knowledge of the owners. *Held*, further, that the accused was guilty of abetment, although the technical offence of theft had not been committed. EMPRESS, THE vs. TOYLUKHO NATH CHOWDHRY 525

—— —— section 193—*Imprisonment, Sentence of—Criminal Procedure Code, section 297, clause 6.*] Under section 193 of the Indian Penal Code, it is obligatory upon the Court, in every case of conviction under that section, to pass some sentence of imprisonment. EMPRESS, THE vs. KHODAI SINGH 527

—— —— section 193. See CRIMINAL PROCEDURE CODE 599

Information. See INQUIRY 87

Infringement of Right of Ferry. See FERRY 427

Injunction. See LIMITATION 336

——. See FERRY... 427

——. *Court of Co-ordinate Jurisdiction—Invalid Decree—Jurisdiction—Dena-powna—Assignee of Judgment-debtor—Substitution.*] No Judge has power to issue an injunction against a decree-holder to restrain him from executing the decree of another Judge exercising co-ordinate jurisdiction, upon the ground that the proceedings by which the decree was obtained were altogether illegal. A, the owner of an indigo concern, sold the property to B, the deed of sale containing a *dena-powna* clause. A party who held an unsatisfied decree against A, applied to the Court to substitute B's name for A's in the record, with a view of taking out execution against B. The application was granted. *Held*, (affirming the decision of WHITE, J.) that the Court had no jurisdiction to make such an order. DHORONI DHUR SEN vs. THE AGRA BANK 421

Inquiry—*Agent—Information—Dewan—Kazanchi—Code of Criminal Procedure, sections 90, 206—Offence.*] In an inquiry, such as is contemplated by section 206 of the Code of Criminal Procedure, it is necessary that the accused should have a clear statement made to him: (1) that he is about to be put upon his trial; and (2) what the offence is of which he is charged. *Quære.*—Whether a *Dewan* or a *Kazanchi* is an agent within the meaning of section 90 of the Code of Criminal Procedure; and, if so, whether he is bound to give any information except in the case of a sudden or unnatural death. IN THE MATTER OF ACHARJEE LALL 87

ee JUDICIAL PROCEEDING ... 59

—*Act X of* 1877, *section* 344—*Ap-be declared Insolvent—Collector's ot Court—Act VI of* 1871, *section* 1877, *section* 2.] An application 344 of Act X of 1877, for a decla-olvency, made by a person impri-r of the Collector under the pro-t VII (B. C.) of 1868, cannot be A Collector's Court, although it ain powers under the Civil Pro-, is not a Civil Court within the ection 15 of Act VI of 1871; nor ate to a District Court within the Act X of 1877, section 2. BODRU THE MATTER OF 508

Bond by Judgment-debtor. IRED DECREE. 554

nhancement—Arrears of Rent— aintiff (landlord) served a notice on it (tenant) requiring him to pay hanced rate. The defendant refus-s brought, and a decree obtained rent of the year 1278, on the basis e. While this case was pending, ght a suit for the rent of 1279, and ecree with interest from the date of n the former suit—the first decree rent at the enhanced rate. *Held*, that entitled to interest from the time the year 1279 became due. DOYA-WDHRAINEE vs. BHOLANATH GHOSE, t X. Rulings, 77, cited and follow-HUN NEOGEE vs. ANUND CHUNDER 10 W. R., 166, dissented from. ISANULLAH vs. AFTABUDDIN MAHO- 382

See JURISDICTION 375

alculation of. See MESNE PRO- 517

on Decree—*Execution delayed by er.*] The fact of a decree-holder ed for a considerable time to take n of his decree is no ground for the ng to allow him interest at the rate such decree to be paid upon the m recovered, from the date of decree ation. BANY MADHUB TRIVADI vs. L SIRCAR... 523

ation—*Session Cases—Act X of on* 296—*Discharge of Accused—xamination of Witness—Revival of*] In section 296 of the Code of ocedure, "Session Cases" mean cases riable by a Court of Session. Where Magistrate discharges an accused out having examined the principal the case, his order is bad, and the agistrate is competent to revive the . EMPRESS vs. DONELLY, I. L. R., 2

Interpretation—*continued.* Cal., 405, cited and followed. ISHEN CHUNDER KURMOKAR vs. HURRY DOYAL KURMOKAR 263

Intervenor. See LIMITATION 25

——————. See NOTICE 551

Invalid Decree. See INJUNCTION ... 421

Investigation. See JUDICIAL PROCEEDING 59

Irregularity. See RES JUDICATA ... 253

Issues, Settlement of. See APPEAL ... 311

Jain Law. SEE HINDU LAW 465

Joint Brothers, Service upon. See NOTICE 432

Joint Decree. See LIMITATION 480

——————*Act VIII of* 1859, *section* 207 —*Execution of part of Decree.*] A joint decree was passed in favour of A and B, and A subsequently applied for execution alone, alleging that B would not join with him in the application. The judgment-debtor stated, and B admitted, that more than half of the decretal money had been paid to the latter (out of Court), but the Court disbelieved the statement, and ordered execution to issue for the full amount of the decree. *Held*, that the Court should, under section 207 of Act VIII of 1859, have allowed execution for half the amount of the decree only. BROJESWARIE CHOWDHRANEE vs. TRIPOORA SOONDEREE DEBI 513

Joint Family. See PRESUMPTIONS ... 97

—————— *Mitakshara Law—Adopted Son, Share of—Specific Share, Right to—Representation—Partition, Right to.*] In an undivided Hindu family, governed by the Mitakshara law, no member has a vested right to a specific share in the family property. If, in an undivided Mitakshara family consisting of three brothers, one of the brothers dies leaving an adopted son, the share of that son, on partition of the property which descended to the three brothers, will be only half of that which his adoptive father could have claimed had the latter been alive at the date of partition. In an undivided Hindu family governed by the Mitakshara law, an adopted son and the adopted son of a natural son stand exactly in the same position on partition. CANUNGOE RAGHUBANUND DAS vs. SADHU CHURN DAS 534

Joint Fine. See CODE OF CRIMINAL PROCEDURE, SECTION 308 404

Joint Hindu Family. See MITAKSHARA LAW 282

—————————— See LIMITATION 336

—————————— See SERVICE OF NOTICE 359

Joint Lease. SEE SHARE OF RENT, SUIT FOR 223

Joint Trial. See CONFESSION OF ACCOMPLICE 270

Judgment-debtor, Assignee of. See INJUNCTION... 421

Judicial Proceeding—*Investigation—Inquiry—Unnatural Death—Magistrate—Code of Criminal Procedure, section* 135—*Act X of* 1872, *section* 135.] When, under the provisions of the Code of Criminal Procedure, section 135, a Joint Magistrate has held an inquiry and made a report to the Magistrate of the District, the High Court has no power to send for that report, as it forms no part of a judicial proceeding. IN THE MATTER OF TROILOKHONATH BISWAS ... 59

Jurisdiction—*Suits for Rent of Houses—Small Cause Court—Act VIII (B.C.) of* 1869—*Rent of Houses.*] The rulings applicable to suits for rent of houses, or of portions of land covered with houses or markets, have no reference to suits in which rent is claimed in respect of a mouzah or of an entire estate, or the aliquot part of an estate. Hence, a suit for rent of 8 annas of a mouzah which was part of the plaintiff's zemindary, held in farm as a whole by the defendant, may be properly brought in a Civil Court under the provisions of Act VIII (B.C.) of 1869. SHAH GANEEMUT HOSSEIN vs. RUNGOO SAHOO 8

——— See EXECUTION OF DECREE ... 30

——— See LEGISLATIVE COUNCILS, POWERS OF 197

——— See ORDER MADE UNDER ACT VIII OF 1859 208

——— See NOTICE 551

——— See INJUNCTION 421

2 ——— *Valuation*—Ad Valorem *Duty—Stamp Duty—Appellate Court—Court Fees' Act, VII of* 1870, *section* 12, *cl.* 2.] Where a Moonsiff ruled erroneously that a suit instituted in his Court had been correctly valued, and it appeared that, if the suit had been correctly valued, the Moonsiff would not have had jurisdiction to entertain it, the lower Appellate Court, having regard to clause 2, section 12 of the Court Fees' Act, VII of 1870, ordered that the appeal should be decreed, the plaint retained until the plaintiff should pay the additional stamp duty, when the suit would be made over to the Subordinate Judge for re-trial. *Held*, that the order was a proper one. BROJO COOMAR SEN vs. ESHAN CHUNDER DASS ... 79

3 ——— *Third Class Powers—Second Class Powers—Magistrate—Code of Criminal Procedure, section* 294.] On the 22nd of May 1878, a Deputy Magistrate, invested with 3rd class powers only, sentenced an accused person to three months' imprisonment under section 417 of the Penal Code, thus exercising 2nd class powers. On appeal, the Magistrate, on the 18th of June, annulled the sentence and directed a new trial, under section 284 of the Code of Criminal Procedure. On the 26th of June the Government issued a notification, investing the Deputy Magistrate with 2nd class powers, to take effect from the 25th of March to the 31st of May 1878. *Held*, that the notification did not render the Magistrate's order illegal, as the Deputy Magistrate had no jurisdiction to exercise 2nd class powers on the 22nd of May. MUSSAMUT SURGEE, IN THE MATTER OF ... 231

4 ——— *Civil Courts—Revenue Courts—Zemindar—Agent—Dewan—Act X of* 1859, *section* 24.] In a district where Act X of 1859 is still in force, a suit against a dewan for the recovery of money alleged to have been misappropriated, and a large portion of which was received by the dewan not in the course of his employment, is cognizable by the Civil Courts. RAJA KUMUD NARAIN BHUP vs. PURNO CHUNDER ROY CHOWDHRY 258

5 ——— *Benamee—Onus of proof—Land, suit for—Title Deeds—Tender—Lien, waiver of—Interest—Jus Tertii.* In the year 1835, A, being the owner of a certain house and premises in Calcutta—constituting the family dwelling-house, executed a Bengali bill of sale in favour of his wife B, purporting to convey to her absolutely the property for valuable consideration. A died in 1845, and B in 1852 executed a deed of gift conveying the same property to her nephew C. Other immoveable property in the mofussil had been purchased in the name of C. in 1849. In 1873 B deposited the title deeds of the latter property and some jewelry with the defendant as security for a sum of money to be advanced to C, which advance was subsequently made. In 1874 C. died, and after his death B handed over the title deeds of the Calcutta property to the defendant. The plaintiff as the heir of C. then brought this suit to recover the two sets of title deeds and the jewelry. The defendant alleged that the conveyances of 1835 and 1852 were illusory, and that the mofussil property had been purchased out of accumulations arising from A's estate, and he therefore claimed the properties and the deeds to which they relate as the heir of A, subject, however, to B's life interest therein as a Hindoo widow. The defendant further alleged that the loan was made to B. and that he had throughout treated B as his debtor; it was also pleaded that the suit, so far as it related to the title deeds of the mofussil property, was a suit for land within the meaning of section 12 of the Charter, and that therefore the Court had no jurisdiction. At the hearing no tender was proved. It was found that the loan had been made to C as principal throughout. *Held*, that as between plaintiff and defendant the plaintiff by the effect of the deed of gift of 1852 was entitled to the title deeds of the Calcutta property, since the deed of gift, though illusory, still remained uncancelled; that

ction—*continued.*
eds of the mofussil property and the having been deposited by B as agent for ecurity for a loan to C, the defendant t set up against the plaintiff the title of party; and that a suit for title deeds of situated outside the jurisdiction of the not a suit for land within the meaning n 12 of the Charter. *Held*, also, that person has a lien on certain property for unt of a debt, such person, in order to to rely on his lien as a defence, must be how that at the commencement of the recover the property, he was ready to up the property on payment of the debt; e no tender need be proved, and interest debt will not be allowed beyond the date e plaintiff shows himself ready and willay the amount of the debt. BOARDMAN 1 Camp.; and DIRKS vs. RICHARDS, 4 Gr., 574, cited and followed. JUGGERDOSS vs. BRIJNAUTH DOSS 375

———*Rajah of Tipperah—Maintenrant—Life Interest—Hereditary Grant uction of Deed of Gift.*] Save in reshis zemindary in British Territory, the Tipperah is not subject to the jurisdiche Courts in British India, except in entioned in clauses (*a*), (*b*), (*c*), section X of 1877. NILKRISTO DEB BARMANO CHUNDRA THAKUR, 3 B. L. R., P. C., 13; KUMAR NOBODIP CHUNDRO DEB BUR. RAJAH BIR CHANDRA, 25 W. R., 407. A maintenance grant claimed to be ry—*held* to be for life only—LEKHRAJ KUNHYA SINGH, I. L. R., 3 Cal., 212. A maintenance grant which the donor o be paid by his agent out of the reof a certain zemindary, does not form a on that zemindary. MAHARAJAH BIR R MANICKYA BAHADUR vs. ISHAN CHUNAKUR 417

———*Cause of Action—Place of Performance of Contract—Forum.*] delivered to the defendant at the latter's t Cossipore, fifty maunds of indigo seed. agreed that payment should be made at 's place of business within the limits of onsiff's Court at Krishnagur. *Held*, latter Court had jurisdiction to enter uit for the price of the seed. HARI MULLICK vs. GOBARDHUN DASS ... 459

See CONFESSION OF ACCOMPLICE ... 270

rtii. See JURISDICTION 375

rat. See CONSTRUCTION OF DOCUT 74

hi. See INQUIRY ...

ndi. See LIMITATION

har. See MAL...

See LIMITATION

Land, Suit for. See JURISDICTION ... 375

Lands taken for Public purposes. See RES JUDICATA 211

Landlord and Tenant—*Burden of Proof—Onus—Rent Decree, Effect of—Withdrawal of Suit, Effect of—Non-payment of Rent—Act I of 1872, section* 109.] Where A brings a suit for rent of certain lands against B, and gets a decree, the effect of that decree is to establish the relationship of landlord and tenant between A and B. When the relation of landlord and tenant has been established between two parties, the fact that the landlord instituted a suit for rent which he afterwards withdrew is not sufficient to show that that relationship has ceased. Where the relationship of landlord and tenant has once been proved, the mere non-payment of rent, though for many years, is not enough to show that the relationship has ceased to exist, the tenant-defendant is bound to show that it has ceased by some affirmative proof; especially when the tenant does not deny that he still continues to hold the lands in question. Evidence Act, I of 1872, section 109, quoted. RUNGO LALL MUNDUL vs. ABDOOL GUFFOOR 119

———————See CONSTRUCTION OF CONTRACT 74

2 ———————*Rent, Liability for—Mortgagee of Lessee—Lease, Liability of transferee of.*] Except under special circumstances, which the plaintiff must prove, a tenant defendant cannot be held liable for the rent which has accrued due prior to his taking possession. Hence, if A leases land to B, who transfers the lease to C, and C mortgages to D, who afterwards forecloses his mortgage and takes possession of the demised premises, D cannot be held liable for any rent which has accrued due prior to his taking possession. E. R. MACNAGHTEN vs. LALLA MEWA LALL 265

Lease, Liability of Transferee of. See LANDLORD AND TENANT 265

Leave to bring fresh Suit. See RES JUDICATA 447

Legal Remembrancer. See PRACTICE ... 33

Legal Representative. See ESTOPPEL ... 134

Legislative Councils, Powers of—*Plenary powers of Legislation—Delegation—Jurisdiction—24 and 25 Vict., Cap. 67—24 and 25 Vict., Cap. 104, secs. 9, 11—28 Vict., Cap. 15—Letters Patent of* 1865—*Act XIII of* 1868.] The Statutes 24 and 25 Vict., c. 104, 28 Vict., c. 15, and the Letters Patent of 1865 [illegible] template and as [illegible] lative author[illegible] India in Cou[illegible] fro[illegible]

Legislative Council, &c.—*continued.*
Act of the Imperial Parliament which created it, and it can do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. When a question arises whether the prescribed limits have been exceeded, the established Courts of Justice must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they were restricted. If what has been done is legislation within the general scope of the words which give the power, and if it violates no express condition or restriction by which that power is limited, (in which category would be included any Act of Parliament at variance with it,) it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions. When plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial legislature, they may be well exercised either absolutely or conditionally; and the Indian Legislature has power to legislate conditionally on the use of particular powers, or on the exercise of a limited discretion by a person in whom it places confidence. The Governor-General in Council could not, by any form of enactment, create in India, and arm with legislative authority, a new legislative power, not created or authorized by the Council's Act; but nothing of that kind has been done or attempted in Act XXII of 1869. THE QUEEN vs. BURA HANGSEH and BOOK SINGH 197

Letter. See PRACTICE 93

Letters Patent of 1865. See LEGISLATIVE COUNCILS, POWERS OF 197

Liabilities of Shipowners for goods after being landed. See CARRIER BY SEA 585

Lien, Waiver of. See JURISDICTION ... 375

Life Interest. See JURISDICTION ... 417

Limitation—*Execution of Decree—Acknowledgment—Act IX of* 1871, *section* 20—*Act IX of* 1871, *Sch. II., Art.* 167.] Application for execution of a decree against the heir of the judgment-debtor was made on the 26th July 1871. On the 30th November of the same year the debtor applied by petition for two months' time. The application for execution was struck off for default. A subsequent application for execution was made on the 5th September 1874, and now again on the 22nd September 1877. *Held*, that the petition of the 30th November 1871 was not an acknowledgment within the meaning of section 20 of Act IX of 1871, so as to save limitation, and that the decree was barred at the date

Limitation—*continued.*
of the application for execution (5th Se
in 1874. *Held*, also, that the fact of th
cation for execution in 1874 having been
did not prevent the Court from looking
to see if the decree were barred. KAL
SUNNO HAZRA vs. HEERA LAL MUNDAL,
2 Cal., 468; and BISSESSUR MULLICK vs
RAJAH MAHATAB CHUNDER, 10 W. R.,
followed. ISHANA DARIA v. GIRIJA K
HIRY CHOWDHRY ... ...

——— See REVENUE AUCTION SA

2——— *Execution of Decree—In*
—Act VIII of 1859, *sec.* 246—*Act IX*
Sch. II., Cl. 15.] In execution of a d
tained by A against B, certain property
tached. C intervened, claiming the pro
his, but an order was passed under sect
Act VIII of 1859, disallowing the claim
than twelve months from the date of t
C brought a suit for establishing his
the property. *Held*, that the suit was n
by the provisions of Cl. 15, Sch. II, A
1871. KOYLASH CHUNDER PAUL CHOW
PRONATH ROY CHOWDHRY... ...

3——— *Execution of Decree—Se*
ecution—Setting aside Sale—Revival
ceedings in Execution—Act IX of 1871,
Art. 167.] A decree-holder, in executio
cree, sold some property belonging to
ment-debtor on the 2nd of October 1871,
execution proceedings were struck off on
of February 1872. The judgment-debto
a suit, and had the sale set aside on the
May 1873. On the 22nd of December
decree-holder again applied for execution
that the application must be taken a
revive the former proceedings of 1871,
execution of the decree was not barred
tation. BABOO PYAROO TUHOBILDAR
SYUD NAZIR HOSSEIN, 23 W. R., 183,
followed. ISHWARI DASSEE vs. SHAHA
KHALEH ... ...

4——— *Execution of Decree—*
—Proceedings barred by Limitation—
—Act IX of 1871, *Schedule II, Art.*
decree-holder having arrested his judg
tor in execution of the decree, the latter
leased from arrest on agreeing to pay th
of the decree in monthly instalments
rupees. The execution proceedings w
struck off the file in September 187
judgment-debtor continued to pay unti
1876, when he ceased. The decree-hol
applied for execution of the decree a
property of the debtor. *Held*, that
was barred by limitation, because
three years had elapsed from the
last application to enforce or keep in
decree. HURRONATH BHUNJO vs. C
GHOSE ... ...

—*continued.*

—— *Execution of Decree—Attach-*
—Act VIII (B.C.) of 1869, *section*
ee in a suit instituted under Act
of 1869, was passed on the 13th of
. Application for execution was
e 18th of February 1876, but no
tachment or sale was issued until
pril 1876. *Held*, that the attach-
lid, and not void as barred by limi-
section 58, Act VIII (B. C.) of
A LALL SEAL vs. PORAN MATTEAH,
Act X), 84; RHEDOY KRISHNA
YLASH CHUNDER BOSE, 13 W. R., 3
LALLA RAM SAHOY vs. DODRAJ
W. R., 395, cited. DEODHARY
NWAR DOWLUT RAM ... 189

——*Execution of Decree—Appli-*
ecution—Attachment kept in force.]
ler applied for execution on the 10th
371. On the 24th of February 1872
application to the Court executing
at the case should be taken off the
present, but that the attachment,
en issued, should be kept in force.
ion was granted, but the formal
awn up, though it recited the ap-
s merely to take the case off the file.
of February 1875, the decree-holder
further execution. It was objected
n of the decree was barred by limi-
it was held that limitation did not
petition was for the continuance of
d proceedings and not for fresh ex-
LAMI SAHU vs. CHUTTERBHOOJ
... ... 261

——*Joint Hindu Family—Mortgage*
of Mortgagee—Manager—Kurta
Repeal of Act—Injunction—Fore-
IX. of 1871, *Sch. II., Art.* 149.]
of a joint Hindu family consisting
ers mortgaged his share to his eldest
plaintiff (who was then in possession
of the family), in the year 1842,
of Rs. 8,000. It was covenanted
ney should be paid on demand with
compound interest from the date of
and that if the money were not
and the mortgagee might enter into
In 1847, the parties entered into an
for an amicable partition, and it
reed that certain property belonging
be given to the plaintiff in exchange
y due on the mortgage, but the pro-
e dropped. In 1871 a partition suit
d by one of the brothers, and in 1876
by metes and bounds of the family
s made, and each member put into
his share. Before possession of A's
h had devolved on the defendant
ath of A's widow) was taken from
in 1876, he made a demand for the
the mortgage money which was re-
then brought a suit for the recovery

Limitation—*continued.*

of the mortgage money and for an injunction to prevent the share which devolved on the defendant from being taken out of his hands under the partition decree. *Held*, on the facts of the case, that there was sufficient evidence of a demand having been made in 1847 to set limitation running, and that the suit was barred by limitation. *Quære.*—Whether the repeal of Act XIV of 1859 revived a right to sue which had become barred under that Act. KRISHNA MOHUN BOSE vs. OKHIL MONEE DOSSEE, I. L. R., 3 Cal., 335 cited; Art. 149, Sch. II., Act IX of 1871, discussed. RAM CHUNDER GHOSAL vs. HEMANDINI DEBI 336

——— See VOID BEQUEST 315

8 ——*Possession within twelve years—*
Dispossession—Act IX of 1871, *Sch. II., Art.* 91.] In a suit for possession on the ground of previous dispossession it is not necessary that the plaintiff should prove a dispossession at the precise time mentioned in the plaint. If he shows that he was in possession within twelve years before the commencement of the suit, and was dispossessed by the defendant at any time within those twelve years, he has *primâ facie* to recover. What suits are governed by Act IX of 1871, Sch. II, Art. 91, stated. TORAB ALI vs. MAHOMED AMEER HOSSEIN 105

9 ——*Setting aside mourosi lease—*
Alienation by Guardian—Guardian—Minor.]
On the 7th of May 1847, a Hindu widow, acting as guardian of her infant son, gave a *mourosi* lease of certain premises to the defendant. The son died a minor and unmarried, and the widow, under a power, adopted the plaintiff in his stead. The widow died in 1861. The plaintiff came of age on the 10th of February 1872, and on the 8th of February 1875, instituted a suit for the purpose of setting aside the *mourosi* lease. *Held*, that the suit was not barred by limitation. HUNGOMAN PERSHAD PANDAY vs. MUSSAMUT BAHORI MUNRAJ KOONWARRE, 6 Moore's Ind. App., 393, cited and followed; GOBINDO NATH ROY vs. RAM KANAY CHOWDHRY, 24 W. R., 183; and GOBINDO COOMER CHOWDHRY vs. HURO CHUNDER CHOWDHRY, 7 W. R., 134, cited and distinguished. PROSONONATH ROY CHOWDHRY vs. AFZOLONESSA BEGUM 391

——— See ACCOUNT, SUIT FOR ... 444

——— See TITLE 450

——— See POSSESSION BY TENANT 576

10 ——*Act IX of* 1871—*Schedule II,*
Art. 167—*Final Decree or Order.*] A obtained a joint and several money decrees against four defendants on the 12th November 1872. One of the defendants preferred an appeal, and the decree, as against him, was set aside by the High Court on the 19th February 1875. Subsequently, on the 1st of August 1876, A sued out execution against the three defendants who had

Limitation—*continued.*
not appealed. *Held*, that A's suit was not barred by limitation, as the final decree in the original suit, within the meaning of Art. 167 of Act IX of 1871, was the decree as amended by the High Court on the 19th of February 1875. GANGA MOYEE DASSEE vs. SHIB SUNDER BHUTTACHARJEE 430

11——— *Act XV of* 1877, *Schedule II. Art.* 171—*Code of Civil Procedure. Act X of* 1877, *sections* 365, 582 *and* 587—*Special Appeal —Death of Appellant.*] A suit was instituted and a decree obtained in the Court of First Instance while Act X of 1859 was in force, but the second decree was made, and the second or special appeal preferred, after Act X of 1877 became law. Pending the hearing of such special appeal, on the 21st April 1878, the plaintiff, who was also appellant, died, and on the 16th August in the same year, or more than 60 days after his father's death, his son and sole heir applied to the Court to be substituted as appellant in place of the deceased, for the purpose of prosecuting the appeal. *Held*, that the application was not made under section 365, but under section 587 of Act X of 1877, as incorporated with the former section, and was therefore not barred by Art. 171, Schedule II, of Act XV of 1877. Where the language of an Act of Limitation specifies the particular cases for which a period of limitation is provided, the Court ought not to interpret that language so as to include cases not falling within the strict meaning of the words used. RAM SUNKUR BHADOORY, IN THE MATTER OF 440

12———*Agent—Account—Refusal to Account—Neglect to Account—Mookhtar.*] An account of his receipts and disbursements having been demanded from a mookhtar, he, on the 3rd of August 1872, wrote a letter in which he promised to render full accounts during the ensuing vacation. This he neglected, though he did not refuse, to do. *Held*, that the limitation for a suit to compel an adjustment of account ran from the time when the defendant's promise to render accounts was broken, and was governed by Act IX of 1871, Sch. II, Art. 90, (see Act XV of 1877, Sch. II, Art. 90.) HORI NARAIN GHOSE vs. THE ADMINISTRATOR-GENERAL ... 446

———See PLAINT, FORM OF ... 509

13———*Contribution—Joint Decree—Act IX of* 1871, *Sch. II, Art.* 100.] Under Art. 100, in Sch. II. of Act IX of 1871, when a person has paid more than his own share of a joint decree, limitation runs against a suit for contribution from the time that the excess payment is actually made to the decree-holder. RADHA KRISTO BALO vs. RUP CHUNDER NUNDI 480

Lis Pendens—*Purchaser under Money-decree —Decree declaring lien—Mortgage Decree—*

Lis Pendens—*continued.*
Right of Redemption.] Defendant, in execution of a money-decree, obtained by him against A in 1872, sold certain property belonging to A on the 10th of September 1874, became himself the purchaser, and entered into possession. In the meantime, on the 10th of July 1874, a person to whom this property had been mortgaged in 1872, brought a suit on his mortgage, and on the 17th of September obtained a decree declaring his lien; in execution of this decree the mortgaged property was sold to the vendor of the plaintiff on the 23rd of February 1875. In a suit for possession, *Held*, that the defendant was bound by *lis pendens*; that, therefore, the plaintiff was entitled to a decree for possession; and that the defendant could not claim to hold the land subject to the mortgage. LALA KALI PERSHAD vs. BULI SINGH 396

Local Inquiry. See POSSESSION 134

Local Investigation—*Commission—District Judge, Powers of.*] Where a Subordinate Judge, in a suit depending in his own Court, issues a commission for a local investigation at the instance of the plaintiff and with the consent of the defendant, the District Judge has no power to interfere with or prevent the execution of that order. NIBUD KRISTO ROY vs. WUMA NATH MUKERJEE 234

Loss by Fire. See CARRIER BY SEA ... 585

Lost Deed. See PLAINT, FORM OF ... 509

Magistrate. See JUDICIAL PROCEEDING 59

——— See JURISDICTION ... 251

Magistrate's Inquiry. See POSSESSION 134

Mahomedan Law. See PRE-EMPTION ... 166

Maintenance Grant. See JURISDICTION 417

Manager. See ENDOWMENT 111

——— See LIMITATION 336

Marriage of Widows. See ADULTERY... 419

Measurement of Land. See CONSTRUCTION OF CONTRACT 74

Merger—*Contribution—Putneedar—Zemindar.*] The putneedar of a mehal which formed a portion of a zemindary, purchased the zemindary rights in the mehal. From the date of his purchase he paid no rent as putneedar. *Held*, that he could not set up his title as putneedar against his zemindary co-sharers, in a suit brought by them for contribution. PROSUNNO NATH [illegible] vs. JOGUT CHUNDER PUNDIT ... ... [illegible]

———See MORTGAGE ... ...

Mesne Profits—*Wasilat—Putnee Tal[illegible] Arrears of Rent—Setting aside sale—Di[illegible]nee.*] A zemindar granted a putnee to A, [illegible] granted a durputnee to B. The putnee was [illegible] for arrears of rent to C, who entered into pu[illegible]

Mesne Profits—*continued.*
sion, cancelled B's durputnee, and after two years' possession, granted a durputnee to D. Meantime A, the original putneedar, had the sale set aside in a regular suit brought for that purpose, and thereupon B brought a suit against D alone for mesne profits. *Held*, that D was entitled to be credited with the amount of rent which he had paid to his putneedar C, and with the expenses of collection. NUFFER ALI BISWAS vs. RAMESHUR BHUNICK... 28

2 ——— *Wrongful Possession—Amount recoverable.*] A, having obtained a decree against B for possession of certain property, instituted a suit for mesne profits for the time during which B had been wrongfully in possession. The latter having proved that he had paid for Government revenue in respect of the property sums in excess of the rents received by him, this suit was dismissed. Thereupon, B brought a suit against A to recover the amount so paid in excess of the rents received. *Held*, that such a suit would not lie, as A had been a trespasser, and must bear the burthen of his own wrong. DOE vs. HARE, 2 C. and M., 145, cited and followed. TILUCK CHAND BABOO vs. SOUDAMINEE DASSEE ... 456

3 ——— *Interest, Calculation of.*] A judgment-debtor, who has been kept out of possession for several years, is entitled not merely to bare rental, but to compensation for the loss he has sustained. Under ordinary circumstances, therefore, in a suit for mesne profits where the decree-holder has been kept out of possession for several years, interest should be calculated upon the rental at the end of each year upon which it accrued due; and the aggregate of the sums due for rent and interest thereon for each year constitute the mesne profits, upon which interest may be directed by the decree to be paid until realization. *Quære.*—Whether the definition of "mesne profits" in section 211 of Act X of 1877 contemplates the calculation of interest as above. HURROO DOORGA CHOWDHRANY vs. MAHARANEE SHURRAT SOONDERY DABEE 517

Minor. See FRAUD 17
——— See LIMITATION 391

Minors. See SALE IN EXECUTION OF DECREE 473

Misconduct of Judge—*Refusal to hear Vakeel—Appeal—Petition—Ground of Appeal.*] Where a party desires or intends to make the misconduct of a Judge a ground of appeal to the High Court, he ought always to draw the Judge's attention to that matter, either by presenting a petition or otherwise, so that a proper record may be at once made of the facts which he desires to establish in appeal. JARDINE vs. TARINI CHURUN SEN, 6 B. L. R., Appendix, 44, distinguished. RAM KOOMAR KYBURTO DASS vs. SOORUN DASS PORAMANICK 23

Mitakshara. See HINDU LAW 465

Mitakshara Law. See RES JUDICATA... 31
——— See JOINT FAMILY ... 534
——— *Joint Hindu family—Alienation by Members of joint family—Alienations made without necessity—Purchaser at Execution Sale, Rights of.*] Where several of the members of a joint Hindu (Mitakshara) family pledge the family property for re-payment of a loan, and the creditor obtains a decree against his debtors, in execution of which he sells, purchases, and takes possession of the property pledged, then, in a suit by the other members of the family for recovery of the property, on the ground that the pledge was made without necessity or for immoral purposes, the purchaser is entitled to retain so much of the property as belonged to his judgment-debtors, and to have that partitioned off from the remainder. DEEN DYAL LALL vs. JAGDEEP NARAIN SINGH, 1 C. L. R., 49; L. R. 4 Ind. App., 300; followed. BABOO SOOMBUN THAKOOR vs. CHUNDER MUN MISSER ... 282

Mookhtar. See LIMITATION 446

Mortgage. See LIMITATION 336
——— See MERGER... 159
——— *Merger—Foreclosure—Re-opening Foreclosure Proceedings—Equity of Redemption—Account.*] Where A, who has bought the equity of redemption of a mortgage, pays off the mortgage debt and causes the mortgage to be assigned to B in trust for A for the expressed purpose of avoiding merger, no merger will take place. WATTS vs. SYMES, 1 De Gex, M. & G., 240; and ADAMS vs. ANGELL, 5 Ch. D., 634, cited. The owner of certain properties, X, Y and Z, mortgaged first X and Y, and afterwards X, Y and Z, to the same mortgagee. Both mortgages were purchased by A, who, having previously purchased the equity of redemption of X, then sought to foreclose Y in a suit on the first mortgage. Subsequently A brought a second suit against the mortgagor for the money due under the second mortgage. On appeal to the High Court, both suits were heard together, and it was *held*, that, supposing the first mortgage could be foreclosed separately—which was very doubtful—yet the effect of bringing a second suit would be, under such circumstances, to re-open the foreclosure proceedings, (or prevent their being sanctioned by the Court,) and to make A bring X into the account. KALI PROSUNNO GHOSE vs. KAMINI SOONDERY CHOWDRAIN 184

Mortgage Decree. See LIS PENDENS ... 396

Mortgage of Jote. See ESTOPPEL ... 239

Mortgage Money, Suit for. See RES JUDICATA 395

Mortgagee of lessee. See LANDLORD AND TENANT 395

Motion. See RESTITUTION 358

Mouroci Lease, Setting aside. See LIMITATION 391

Neglect to account. See LIMITATION ... 446

Next heir, Concurrence of. See GIFT OF HINDU WIDOW 384

Non-appearance of Defendant. See SMALL CAUSE COURT ACT (Mofussil), section 21... 482

Non-Payment of Rent. SEE LANDLORD AND TENANT 119

Notice. See BENAMEE 9

——— See ESTOPPEL 239

——— See INTEREST 382

———*Actual Notice—Act VIII of* 1869 (*Beng.*) *section* 14—*Service upon joint brothers.*] Where there is evidence that a notice under section 14 of Act VIII of 1869 has actually reached the persons for whom it was intended, such notice is valid, although the formalities enjoined by the section have not been strictly complied with. Service of such notice upon two of four joint brothers is good service. BASSUNT LALL DASS vs. SHEIKH PANA ALI... 432

2 ———*Criminal Procedure Code, section* 530 —*Jurisdiction—Intervenor.*] Notice under section 530 of the Code of Criminal Procedure is a specific notice to the individuals interested in the dispute in consequence of which the proceedings have arisen, and is not a general citation to the public. There is no provision in that Code by which an intervenor can come in and claim possession of the property which is already the subject of proceedings under section 530 in connection with a dispute between other persons—unless the Magistrate shall be satisfied of the existence of a dispute between such intervenor and some one else likely to give rise to a breach of the peace and have recorded a fresh preliminary proceeding to that effect. RAJAH KUMUD NARAIN BHOOP vs. MOHIM CHUNDER 551

——— ENHANCEMENT 547

Notice of Appeal. EXTENSION OF TIME FOR. See PRACTICE 581

Notice of Enhancement. See SERVICE OF NOTICE 359

Notice to Ship. See CONDITION PRECEDENT 297

Offence. See INQUIRY 87

Offences triable Summarily. See SUMMARY JURISDICTION 44

Onus. See DEFAMATION 122

——— See LANDLORD AND TENANT ... 119

——— See JURISDICTION 375

Onus — *Certificate—Possession—Heir-at-Law—Act XXVII of* 1860.] Effect of granting a certificate under Act XXVII of 1860, stated. Where a defendant in possession of certain property resists a suit for possession thereof, brought by parties who have proved themselves to be the nearest heirs of the last full owner, the onus is on the defendant to prove his title. TARINY CHURN CHOWDHRY vs. SARODA SOONDAREE DOSSEE, 3 B. L. R., A. C., 145; and THAKOOR DEEN TEWARRY vs. ALI HOSSEIN KHAN, 13 B. L. R., 427, cited and followed. RAMPROTAB MISSER vs. ABHILAK MISSER 170

Oral Evidence—*Admissibility—Document, Evidence to contradict—Evidence Act I of* 1872, *section* 92.] A, by a deed of sale, absolute on its face, transferred certain land to B for the sum of Rs. 379. A alleged that at the time the transaction was entered into it was understood and orally agreed that the sale was merely by way of security for the payment of Rs. 400 due to a third party, C, under a compromise made by A with C for the satisfaction of a decree for Rs. 832, which the latter held against A; and that it was at the same time orally agreed between A and B that on the payment of the money by A to C the deed of sale should be delivered to the former. Subsequently A brought a suit against B for the return of the *kobala*, alleging that the whole of the money had been paid to C. *Held*, that section 92 of the Evidence Act, I of 1872, prevented the admission of evidence of the oral agreement to contradict the deed of sale which had admittedly been contemporaneous. RAM DOYAL BAJPIE vs. HEERA LALL PARAY ... 386

Order, Appeal from. See APPEAL ... 311

Order made under Act VIII of 1859—*Repeal of Act—Jurisdiction—Execution of Decree—Sale set aside—Act VIII of* 1859, *section* 257 —*Act X of* 1877, *sections* 312, 588 *m.*] On the 16th of June 1877, certain property was sold in execution of decree, and on the 29th of June 1877, the judgment-debtor, the owner of the property, applied to the Court to set aside the sale, and the sale was set aside by the Subordinate Judge on 24th of January 1878. The decree-holder, who was the purchaser of the property, appealed to the Court of the District Judge who reversed the order of the Subordinate Judge. *Held*, that the Judge had no jurisdiction to do so, as the proceedings must be taken to be governed by Act VIII of 1859, and not by Act X of 1877. RUNJIT SINGH vs. MEHARBAN KOER, 2 C L. R., 391, cited and followed. BABU HOSSEIN vs. MAJIDOONNISSA... ... ...

Owner of land standing by. See FRAUD

Ownership. See WILD ANIMALS... ...

Parties to Suit. See RES JUDICATA ...

Part Payment. See FRAUD ... ...

n by Collector—*Private Partition—Proceedings—Cause of Action—Act* 1859, *section* 15.] Where there had been partition of an estate, and the several ers had held their lands in accordance , an application was made by some of olders to the Collector to have a fresh made as if the whole lands were held Plaintiff, who was also a shareholder, but his objection was overruled. There- brought a suit for confirmation of the and for an injunction to stay the parti- ing before the Collector. *Held*, that iff's cause of action against the defen- se upon their moving the Collector to with the first partition, and that the limitation in respect of such cause of s the same as in any other suit for de- the rights of parties to immoveable A Civil Court cannot interfere by in- o restrain a Collector's power of parti- where, as between the several share- he extent and nature of the share of een determined, the latter is bound to such determination, and to give effect rrying out the partition if the parties it. MUSSAMUT BEBEE KHOOBUN vs. HURN SINGH 453

n, Private. See PARTITION BY COL- OR 453

n, Right to. See JOINT FAMILY 534

hip. See ARBITRATION 357

Suit. See FRAUD 17

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t of Rent jointly. See SHARE OF , SUIT FOR 223

t of Rent by Tenant to Stranger. POSSESSION BY TENANT 576

t of Rent separately. See PRE- ION 166

——— See ENHANCEMENT OF 21

on delivery. See BREACH OF CON- 287

s, Appropriation of. See APPRO- ION 361

ker. See CONTRACT ACT, section 178 398

ee SECURITY TO KEEP THE ... 280

de. See ACT XLV OF 1860 ... 81

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Proceedings. See CHARTER ACT 137

nce of Contract. See JURISDIC- 459

Decree. See FRAUD 17

Personal Decree. See SALE IN EXECUTION OF DECREE 473

Petition. See MISCONDUCT OF JUDGE ... 23

Plaint, Form of—*Frame of suit—Secondary Evidence—Lost Deed—Correct Copy—Trespass—Limitation—Act IX of* 1871, *cl.* 145.] Where the owner of a tank wishes to bring a suit against a person for fishing in the tank without his permission, the plaint should be framed for the recovery of damages for trespass, and should not be based on an alleged dispossession by reason of the defendant's fishing in the tank. A copy of a deed which has been proved to be lost should not be received in evidence, and is of no value as evidence even when admitted, unless it has first been proved that the copy produced is a correct copy of the lost deed. When a person exercises the right of fishing in a tank adversely for twelve years, his right to fish becomes absolute and indefeasible. LUKHIMONI DASI vs. KORUNA KANT MOITRO... 509

2. ——*Subscription of Plaint—Authorised Agent—Act X of* 1877, *section* 51—*Code of Civil Procedure*]. Under section 51 of the Code of Civil Procedure, Act X of 1877, the Court may, in its discretion, admit a plaint which has been subscribed by an authorized agent of the plaintiff. MAHARANEE SURNOMOYEE vs. POOLIN BEHARY MUNDUL 15

Pledge of Goods. See CONTRACT ACT, section 178 398

Plenary Powers of Legislation. See LEGISLATIVE COUNCILS, POWERS OF... ... 197

Possession—*Magistrate's inquiry—Code of Criminal Procedure, sections* 530, 533—*Local inquiry—Report.*] In a proceeding under section 530 of the Code of Criminal Procedure, the Magistrate must decide the fact of possession on evidence taken by himself, and not according to the result of a local inquiry made under section 533, unless the parties have consented to be bound thereby. *Per* PRINSEP, *J.*—The local enquiry referred to in section 533 should be restricted solely to some question relating to the features of the property about which the dispute has arisen; and should not be directed to any matter which can be proved before the Magistrate by oral evidence. BAIKUNT KUMAR, IN THE MATTER OF 134

——— See ONUS 170

——— See ESTOPPEL 239

——— See GIFT NOT FOLLOWED BY POSSESSION 247

Possession Adverse. See TITLE ... 450

Possession of Agent. See ACTUAL POSSESSION 94

Possession of Goods. See CONTRACT ACT, section 178 398

Possession of Tenant—*Adverse Possession—Payment of Rent by Tenant to Stranger—Limitation.* In December 1853 certain lands were let by the plaintiff to B under a kabuliat, by the terms of which the lease expired in December 1863. In March 1875, less than 12 years from the expiration of such lease the plaintiff brought a suit for possession against B and the talookdars of the estate of which the lands in dispute formed part. The latter alleged that the lakhiraj title of the plaintiff was invalid; that although no proceedings, as required by the Rent Law, had been taken to invalidate the plaintiff's title, they, the talookdars, had resumed possession of the land by receiving the rents from B from 1859, and that the suit was barred by reason of their possession since that date. *Held*, that the suit was not barred, inasmuch as nothing had occurred to determine the tenancy which existed between the plaintiff and B, and that the possession of the latter was in law the plaintiff's possession. PARBUTTI DASSI vs. RAM CHAND BHUTTACHARJEE 576

Possession, Wrongful. See MESNE PROFITS 456

Powers-of-Attorney. See VAKALUTNAMAH 13

Powers of Court in which award is filed. See ARBITRATION 357

Powers of Magistrates. See JURISDICTION 281

Power to receive Documents. See VAKALUTNAMAH 13

Practice—*Section 330, Code of Criminal Procedure—Examination of witness by Commission—Appearance of Magistrate to show cause—Letter—Legal Remembrancer.*] Where a rule is issued, directing a Magistrate to show cause, and he wishes to do so, he should apply to the Legal Remembrancer to have an appearance entered for him in the High Court. The fact that a Hindu lady is expected to make false statements is no ground upon which an application to take her evidence on commission should be refused. HUROSOONDERY CHOWDHRAIN, IN THE MATTER OF 93

2 ——*Indian Companies Act X of 1866, section 141—Notice of Appeal, Extension of Time for.*] Under section 141 of Act X of 1866 (Indian Companies' Act), where no notice of appeal has been given within three weeks from the passing of the order complained against, the Court must dismiss the appeal, unless application has been made for the Court to enlarge the time. *Ex parte*, GREEN, 24 L. J. Ch. 331 and BANNER vs. JOHNSTON, L. R., 5 E. and Ind. App., 157, cited. IN THE MATTER OF SARAWAK and JAINEE HINDUSTAN BANKING and TRADING COMPANY, LD. 581

Pre-emption—*Mahomedan Law—Co-sharer—Payment of Rent separately—Preliminary ceremonies—Talub.*] A and B, Mahomedan co-sharers of a talook, made separate agreements to pay rent to the zemindar, each shareholder being liable for his own share of the rent merely. Subject to this arrangement, the lands continued *ijmalee*: *Held*, that, on a sale by A of part of his share to a stranger, who was also a Mahomedan, B was entitled to pre-emption. Where the first talub (*talub mowasibut*) is made in the presence of witnesses, and the witnesses are then called to bear testimony to the fact, it is not necessary to invoke witnesses on the occasion of the second talub (*talub ishhad*). SYED WAJID ALI KHAN vs. LALA HUNUMAN PROSAD, 4 B. L. R., A. C., 139; and GARIBALA KHAN vs. KEBUL LAL MITTER, 13 W. R., 125, cited. KOROMALI vs. AMIR ALI 166

Preliminary Ceremonies. See PRE-EMPTION 166

Presumptions—*Joint Family—Coparcenary—Hindu Joint Family—Joint ownership.*] *Per* MITTER, *J.*:—When parties, who are not Hindus, reside in a Hindu country, and, adopting the customs of Hindus, have lived as Hindu families do, joint in food and estate, they will be governed by the Hindu law of coparcenary, and the legal presumptions applicable to the position of a joint Hindu family will be applied to them. ABRAHAM vs. ABRAHAM, 9 Moore's Ind. App., 195; and VALLAI MIRA RAVUTTAN vs. MIRA MOIDIN RAVUTTON, 2 Mad. H. C. R., 414, followed. LUDDENTONNISSA vs. NAJADA KHATOON, 2 C. L. R., 308, explained. ACHINA BEBEE vs. AZEEZOONISSA BEBEE, 11 W. R., 45; and MOONSHEE SIRDAR vs. MULUNGO SIRDAR, 24 W. R., 1, followed as to manner of dealing with evidence of joint ownership. RUP CHAND CHOWDHRY vs. LATU CHOWDHRY 97

Priority. See REGISTRATION 434

Prisoner. See CODE OF CRIMINAL PROCEDURE, SECTION 308 404

Privy Council. Res Judicata—*Custom—Family Custom—Koolachar—Impartible property—Mitakshara Law.*] A, claiming as heiress of her deceased son, brought a suit against B and others, for possession of a certain talook, and obtained a decree. In that suit B claimed the talook as the heir of A's son, according to the *Mitakshara* law, and alleged that after the death of A's son he, B, had been installed as *gudinashin* according to ancient usage. Subsequently, B filed a suit, claiming possession of the talook from A on the ground that by a *koolachar*, or family custom, he was entitled to succeed as heir to A's son. *Held*, that the second suit was barred as *Res judicata*. TAVER vs. RAJAH OF SHIVAGUNGA, 11 Moore's Ind. App., 73; KUNNA BEHARI ROY vs. BROJESWAREE CHOWDHRANEE, L. R., 2 Ind. App., 283; SOORJOMOYEE DAYEE vs. SUDDANUND MOHAPATTER, 12 B. L. R., 304, cited and followed. CHINIYA MUDALI vs. VANKATACHELLA PILLAI, 3 Madras H. C. R.

Privy Council—*continued.*
320; and SHAIKH RAMATULLAH vs. SHAIKH SARINTULLAH, 1 B. L. R., F. B., 68, overruled. TEKAIT DOORGA PERSHAD vs. TEKAITNI DOORGA KOONWARI 31

2.——————*Ijara—Term of years—Renewal of Lease—Right of Occupancy.* A right of occupancy may be acquired in respect of an undivided share of an estate. Plaintiff re-let certain lands in *ijara* to defendants for a term of five years, from the 12th of April 1865 to the 12th of April 1870. The pottah contained a clause of renewal on the expiration of the term, and a stipulation that the defendants should accept the renewed pottah and give a kabulyat within two months after fixing the rates. After the expiration of the lease the defendants continued in possession, and on the 28th of December 1872, plaintiff issued a notice, calling on the defendants to take the renewed lease at rates mentioned in the notice, and within two months from the date thereof. The plaintiffs refused to take the lease on the ground that the rates were too high; and on the 25th of August 1874 plaintiff brought a suit for possession of the land. *Held*, affirming the judgment of the High Court, that plaintiff had a right to turn the defendants out of possession at the expiration of the term granted by the lease of 1865, except so far as that right was qualified by the stipulation for a renewal; that the defendants, at the expiration of that lease, had an equitable right to a renewal according to the stipulations in the agreement; that although the defendants were not bound to accept the renewal, if the rent at which the plaintiff offered it were too high, yet in that case it lay upon them to take measures to compel the plaintiff to renew at a proper rate; that the defendants could not compel a renewal of the lease for more than five years, the the original term; and that it was too late to rely upon a right of renewal at a time when, if it had been granted, the renewed lease would have expired. JARDINE, SKINNER AND CO. vs. RANI SURUT SOONDARI DEBI 140

3.——————*Legislative Councils, Powers of—Plenary powers of Legislation—Delegation—Jurisdiction—24 and 25 Vict., Cap. 67—24 and 25 Vict., Cap. 104, secs. 9, 11—28 Vict., Cap. 15—Letters Patent of 1865—Act XXII of 1869*] The Statutes 24 and 25 Vict., c. 104., 28 Vict., c. 15, and the Letters Patent of 1865, expressly contemplate and authorize such an exercise of legislative authority by the Governor-General of India in Council, as might remove any place or territory from the jurisdiction of the High Court at Calcutta. Act XXII of 1869 was, therefore, in its general scope, within the legislative power of the Governor-General in Council. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can do nothing beyond the limits which circumscribe these powers. But, when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. When a question arises whether the prescribed limits have been exceeded, the established Courts of Justice must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they were restricted. If what has been done is legislation within the general scope of the words which give the power, and if it violates no express condition or restriction by which that power is limited, (in which category would be included any act of Parliament at variance with it,) it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions. When plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial legislature, they may be well exercised either absolutely or conditionally; and the Indian Legislature has power to legislate conditionally on the use of particular powers, or on the exercise of a limited discretion by a person in whom it places confidence. The Governor-General in Council could not, by any form of enactment, create in India, and arm with legislative authority, a new legislative power, not created or authorized by the Council's Act; but nothing of that kind has been done or attempted in Act XXII of 1869. THE QUEEN vs. BURA HANGSEH AND BOOK SINGH ... 197

4.——————Res judicata—*Hindu Widow—Deed of gift—Parties to Suit—Cause of Action.*] In 1862, plaintiff brought a suit against a Hindu Widow and other defendants, in which he stated that certain properties, X, Y and Z, belonging to him, had been given to the widow for her life, for maintenance; and that she had alienated X and Y to the other defendants. The plaintiff prayed that the deed of gift might be delivered up to be cancelled; that possession of X might be given to him; and that any alienation of Y might be restrained. No further mention was made of Z; no relief was asked respecting it, nor any assertion made that the widow had improperly dealt with it, or that the defendants were in any way connected with it, and the suit was dismissed as regards Z. After the widow's death plaintiff again sued, for possession of Z, parties who claimed under the defendants in the previous suit against the widow. *Held*, reversing the decision of the High Court of Judicature at Madras, that the second suit was not barred as on a cause of action which was *res adjudicata*. RAMA RAO vs. SURIYA RAO ... 265

5.——————*Hindu Law—Daughter's Estate—Stridhan—Mitakshara—Jain Law.*] Under Mi-

Privy Council—*continued.*
takshara law a daughter takes only a qualified and restricted estate in property inherited from her father, and upon her death the heirs of her father and not her own heirs are entitled to succeed to such property. Where a custom of the Jains is relied upon, it must be proved like any other custom varying the ordinary law. CHOTAY LALL vs. CHUNNO LALL 465

6 ——*Execution Sale—Arrears of Rent—Act VIII (B.C.) of* 1859, *section* 59—*Act VIII of* 1859—*Right, Title and Interest.*] A and his three sisters were joint owners of a certain mouzah, the former holding 7 annas 7 pie and 4 krants, and the latter together 8 annas 4 pie 16 krants of the 16 annas of the estate: In execution of a decree obtained against A, his right, title and interest in the mouzah was sold to B. The zemindar then brought a suit under Act VIII (B C.) of 1869 against A, for arrears of rent in respect of the mouzah, and obtained a decree, in execution of which he applied not for a sale of the tenure as he might have done under section 59 of that Act, but for "attachment and sale of the judgment-debtor's property." Upon this application orders for sale were issued under Act VIII of 1859. The sale notification was headed "under section 246 of Act VIII of 1859," and notified the sale of the rights and interests only of the judgment-debtor. At this sale C became the purchaser, and was put in possession of the mouzah. Thereupon B, the purchaser at the first execution sale, and a third person D, who had meanwhile purchased the share of A's sisters, sued C for possession. *Held*, that B and D were entitled to possession, for that C had acquired nothing under his purchase. DOOLAR CHAND SAHOO vs. LALL CHABEEL CHAND 561

Probate. See ACT XXVII OF 1860 ... 462

Proceedings barred by Limitation. See LIMITATION 161

Prosecution of the Common Object See COMMON OBJECT 49

Purchaser. See REVENUE AUCTION SALE 151

Purchaser at Execution Sale, Right of. See MITAKSHARA LAW 282

Purchaser, Bona fide See BENAMEE ... 9

Purchaser's Liability See RENT SUIT 116

Purchaser under Money-Decree See LIS PENDENS 396

Putneedar. See MERGER... 159

Putnee Talook. See MESNE PROFITS ... 28

——— See SPECIAL APPEAL ... 177

Question raised but not decided in previous suit. See RES JUDICATA ... 447

Re-capture. See WILD ANIMALS ... 515

Receipt on Discharge. See STAMP ACT XVIII OF 1869, Section 15, and Sch. II, Art. 7 591

Rescission. See BREACH OF CONTRACT... 287

Recognizance, Forfeiture of—*Security to keep the peace—Forfeiture of Recognizance—Penalty—Act X of* 1872, *section* 502.] On the 20th of April 1877, A was bound down to keep the peace for one year. On the 14th of January 1878, he was convicted of an offence and sentenced therefor to fine and imprisonment, but no order was made for the recovery of the penalty, though the Magistrate knew that the recognizance had been forfeited. On the 2nd of April 1878, the Magistrate, at the instance of a third party, called upon A to show cause why the penalty of the recognizance should not be paid, and a warrant for its recovery was issued on the 6th of June 1878. *Held*, that the warrant must be quashed, on the ground that the Magistrate having inflicted a sentence of fine and imprisonment with the knowledge that the recognizance was forfeited, he was not competent to inflict a further penalty on a re-consideration of the circumstances. PARBUTTI CHURN BOSE, IN THE MATTER OF 406

Recognized Agent. See PLAINT ... 15

Redemption, Right of. See LIS PENDENS 396

Refund. See RESTITUTION ... 358

Refusal to account. See LIMITATION ... 446

Refusal to hear Vakeel. See MISCONDUCT OF JUDGE 28

Refusal to Ship. See CONDITION PRECEDENT 297

Registration—*Priority—Bill of Sale—Act VIII of* 1871, *section* 50.] A sold a house to B for Rs. 95; the bill of sale was not registered. A afterwards sold the house to C for Rs. 200; the bill of sale in this case was registered. In a suit by B against A and C for possession of the house; *Held*, that section 50 of the Registration Act, VIII of 1871, did not render the plaintiff's bill of sale invalid as against that of C. SHEIK REASUTTOOLLAH vs. DOORGACHURN PAL, 24 W. R., 121; and Special Appeal No. 809 of 1877, cited and followed. WUGRA SINGH vs. ALLAH KOER & REWA SINGH ... ... [illegible]

——— See ESTOPPEL ... ... [illegible]

Regular suit. See RES JUDICATA ... [illegible]

Regulation VIII of 1819. See SPECIAL APPEAL ... ... [illegible]

Re-hearing. See SMALL CAUSE COURT ACT (MOFUSSIL), section 21 ... ... [illegible]

Release of one of Several Partners. See CONTRACT ACT (IX of 1872), section [illegible]

Removal of Goods with Owner's Possession. See INDIAN PENAL CODE, section 108 ... ... [illegible]

Manager. See ENDOWMENT 112
lease. See IJARA 140
See ACCOUNT, SUIT FOR ... 444
ars of. See INTEREST ... 382
, Effect of. See LANDLORD AND 119
ses. See JURISDICTION ... 8
ity for. See LANDLORD AND T 285
ble resistance to lawful Col- of. See SECURITY TO KEEP THE 280
Costs—Charge on Lands.] A de- incurred in a rent suit is no charge ok in respect of which the suit was A subsequent purchaser of a share of does not become liable as such for of the costs due under such decree. NNO SINGHEE vs. BOYKANTO NATH 504
- *Arrears of Rent—Purchaser's Lia- of Tenure.*] The purchaser of an , the rent of which is in arrear, can- personally liable for that portion of ich accrued due before the date of . SHAMA CHUND KOONDOO vs. BROJO 1 W. R., 94, considered and ex- ISH BEHARY BANERJEE vs. PEARY KERJEE 116
r Foreclosure Proceedings. See GE 184
Act. See ORDER MADE UNDER ACT 1859 208
—— See LIMITATION 336
ee POSSESSION 134
ation. See JOINT FAMILY ... 534
atives. See EXECUTION OF DE- 192
—— **Decree against.** See SALE CUTION OF DECREE 473
ata. See ACCOUNT, SUIT FOR 444
—— *Cause of Action—Mortgage for—Possession, Suit for—Act VIII tion 2—Act VIII of* 1859, *section* 7.] fendant mortgaged certain lands to way of *zuripeshgi* lease, under which tered into possession. The first de- erwards gave a *ticca* of the lands to defendant, who turned the plaintiff ssion before the term of the *suri-* had expired. Plaintiff then sued the econd defendants, basing his cause of e dispossession by the second defen- praying for the recovery of the mort- by a sale of the mortgaged property. as dismissed, the Judge observing that roper remedy was to bring a suit for

Res Judicata—*continued.*
possession. Plaintiff then brought a subsequent suit for possession against the same parties, and on the same cause of action. The defendants objected that the suit was barred under sections 2 and 7, Act VIII of 1859, but the contention was overruled. DEODHARI SINGH vs. LALA SEWSARUN LAL 395
2 —— *Custom—Family Custom—Koolachar—Impartible property—Mitakshara Law.*] A, claiming as heiress of her deceased son, brought a suit against B and others, for possession of a certain talook, and obtained a decree. In that suit B claimed the talook as the heir of A's son, according to the *Mitakshara* law, and alleged that after the death of A's son he, B, had been installed as *gudinashin* according to ancient usage. Subsequently, B filed a suit, claiming possession of the talook from A on the ground that by a *koolachar*, or family custom, he was entitled to succeed as heir to A's son. *Held*, that the second suit was barred as *res judicata.* TAVER vs. RAJAH OF SHIVAGUNGA, 11 Moore's Ind. App., 73; KRISHNA BEHARI ROY vs. BROJESWAREE CHOWDHRANEE, L. R., 2 Ind. App., 283; SOORJOMONEY DAYEE vs. SUDDANUND MOHAPATTUR, 12 B. L. R., 304, cited and followed; CHINIYA MUDALI vs. VANKATACHELLA PILLAI, 3 Mad. H. C. R., 320; and SHAIKH RAMATULLAH vs. SHAIKH SARINTULLAH, 1 B. L. R., F. B., 68, overruled. TEKAIT DOORGA PERSHAD vs. TEKAITNI DOORGA KOONWARI ... 31
3 —— *Hindu Widow—Deed of Gift—Parties to Suit—Cause of Action.*] In 1862, plaintiff brought a suit against a Hindu widow and other defendants, in which he stated that certain properties, X, Y and Z, belonging to him, had been given to the widow for her life for maintenance; and that she had alienated X and Y to the other defendants. The plaintiff prayed that the deed of gift might be delivered up to be cancelled; that possession of X might be given to him; and that any alienation of Y might be restrained. No further mention was made of Z; no relief was asked respecting it, nor any assertion made that the widow had improperly dealt with it, or that the defendants were in any way connected with it, and the suit was dismissed as regards Z. After the widow's death, plaintiff again sued for possession of Z, parties who claimed under the defendants in the previous suit against the widow. *Held*, reversing the decision of the High Court of Judicature at Madras, that the second suit was not barred as on a cause of action, which was *res adjudicata.* RAMA RAO vs. SURIYA RAO 265
4 —— *Lands taken for public purposes—Award of compensation—Regular suit—Act X of* 1870, *sections* 37, 38, 39, 40, 58.] When land has been taken up by the Government for public purposes, and a reference is made to the Civil Court by the Collector for an order as to the apportionment of the compensation money amongst

Res Judicata—*continued.*
adverse claimants, the award of the Judge is, unless appealed from, final and binding on the parties in whose presence it was passed; and a subsequent suit by one of the parties to the compensation case for a declaration of his title to the lands, and for an order directing the payment of the compensation money to him, will be barred as *res judicata*. Sections 37, 38, 39, 40, 58, of Act X of 1870, discussed. DWARKA SINGH vs. SOLANO, 22 W R., 38, dissented from; KAMINEE DABEE vs. PROTAP CHUNDER SANDYAL, 25 W. R., 103, distinguished. RAJA NILMONEY SINGH vs. RAM BUNDHU ROY 211

5 ——— *Question raised, but not decided in previous suit—Title—Leave to bring a fresh suit.*] In a suit between A and B a question of title was raised and decided in B's favour in the Court of First Instance, but on appeal the Judge refused to go into it, saying that B might bring a fresh suit. *Held*, that a subsequent suit by B, raising the same question, was not barred as *res judicata*. WATSON vs. THE COLLECTOR OF RAJSHAHYE, 12 W. R., 43, P. C., cited and distinguished. EMAMOODDEEN SOWDAGHUR vs. SHAIKH FUTTEH ALI 447

——— ——— See REVENUE AUCTION SALE 151

6 ——— ——— *Suit for Possession—Setting aside Sale—Irregularity—Void Sale.*] When a plaintiff sues for possession and determination of right to a certain property, and to set aside an execution sale of a portion of the property on the ground of irregularity, and his suit is dismissed on the merits, a subsequent suit for possession of the property sold, on the ground that the sale was void *ab initio*, will be barred as *res judicata*. WOOMA TARA DEBIA vs. UNNOPOORNA DASSEE, 11 B. L. R., 158; and TAVER vs. KATAMA NATCHIAR, 11 Moore's Ind. App., 50, cited and followed. THOMAS M. PIGOU vs. SYED MAHOMED ABOO SYED 253

7 ——— ——— *Unsuccessful suit for Damages for Trespass followed by suit to establish Title to Lands—Act VIII of 1859, section 2.*] A, alleging himself the owner of a certain garden, brought a suit for damages against B and C for forcibly carrying off fruit grown in such garden. In this suit the question, whether A was exclusively in possession of the garden, was incidentally raised and decided against A. Thereupon A, who in the meantime had been ousted from possession, brought a subsequent suit in which B and C, together with others were co-defendants, in which he claimed an undivided share in the same garden. *Held*, that under the circumstances, the doctrine of *res-judicata* did not apply, and that such suit was maintainable. DOORGA RAM PAUL vs. KALLY KRISTO PAUL 549

Restitution—*Refund of Costs—Costs paid under Decrees which are reversed—Motion.*]

Restitution—*continued.*
Where plaintiff's suit is dismissed with costs on a preliminary point in the Court of First Instance, and on appeal, and these decrees are reversed and the case remanded by the Privy Council, a refund of the costs which have been taxed and paid under the reversed decrees will be ordered on motion. DORAB ALLY KHAN vs. ABDOOL AZEEZ 358

Re-trial—*Acquittal—Failure of Justice—Code of Criminal Procedure, sections 220, 216—Charge—Preparing a charge.*] A man accused of theft was acquitted by the Deputy Magistrate under section 220 of the Code of Criminal Procedure. The District Magistrate, at the instance of the Police, ordered the case to be re-tried. It appeared that the Deputy Magistrate had not framed any charge, but that no failure of justice had been occasioned by his not doing so. *Held*, that the Magistrate had no power to order a re-trial, without first setting aside the order of acquittal; and that he had no power to set aside the order of acquittal as the case had not been appealed to him. JOJA PASHAN, IN THE MATTER OF 131

Revenue Auction Sale—*Arrears of Revenue—Sale—Purchaser—Auction purchaser—Cause of Action—Limitation*—Res Judicata.] Where, at an auction sale for arrears of revenue, a person purchases a permanently-settled zemindary, his cause of action, for possession of lands which he alleges to have formed a part of his permanently-settled zemindary, and for which he still pays Government revenue, will be held to have arisen at the date of his purchase. Such a purchaser is not barred by adverse possession which has barred the former (defaulting) proprietor, nor by decrees in suits for possession brought by the former (defaulting) proprietor, in respect of the same lands, and against the same parties. DEWAN RAMJIWAN SINGH vs. THE COLLECTOR OF SHAHABAD, 18 W. R., p. 64; THE COLLECTOR OF MOORSHEDABAD vs. ROY DHUNPUT SINGH BAHADOOR, 23 W. R. 38, cited. NARAIN CHUNDER CHOWDHRY vs. TAYLOR 151

Revenue Courts. See JURISDICTION ... 256

Revenue Sale. See CO-PARTNER ... 226

Reversed Decree. See RESTITUTION ... 358

Reversioner. See GIFT BY HINDU WIDOW [illegible]

Reversionary Heirs, Right of. See HINDU WIDOW, DECREE AGAINST ... [illegible]

Revival of Proceedings. See INTERPRETATION ... ... [illegible]

Revival of Proceedings in Execution ... ... [illegible]

Right of Appeal. See APPEAL... ... [illegible]

Right of Occupancy. See IJARA ... [illegible]

Right of Redemption. See LIS PENDENS 396

Right, Title and Interest. See EXECUTION SALE 561

Sagai Wives. See ADULTERY ... 410

Sale. See SPECIAL APPEAL ... 177

Sale Certificate. See HINDU WIDOW, DECREE AGAINST 530

Sale in Execution. See FRAUD ... 17

——————— See LIMITATION 46

——————— See MITAKSHARA LAW 282

Sale in Execution of Decree. See UNDER-TENURE, SALE OF ... 231

———————*Debts of Ancestor—Representatives, Decree against—Hindu Widow, Decree against—Personal Decree—Minors.*] In a suit against a Hindu widow described in the plaint as "widow of Anund Mohun Surma Roy, deceased, and mother of Denobundhu and Bepin Chunder Roy, minors," for a bond debt due by her late husband, a personal decree was given against the widow. There was nothing contained in the decree to show that the debt had been incurred by any person other than the widow. In execution of the decree a sale was made of the right, title and interest of the judgment-debtor in property belonging to the infants, and which they had inherited from their father. *Held*, that the sale was totally inoperative. *Held*, further, that the fact of the widow having subsequently to the sale succeeded to the property as heir to the minors did not estop her from alleging that the effect of the sale of her right, title and interest in the property of the infants was *nil*. ISHEN CHUNDER MITTER vs. BUKSH ALI SOUDAGAR, Marshall, 614; W. R., Sp., No. 119, cited and distinguished. ALAKMONI DEBI vs. BANIMADHUB CHUCKERBUTTY 473

Sale of Putnee Talook. See SPECIAL APPEAL 177

Sale set aside. See ORDER MADE UNDER ACT VIII OF 1859 208

Sale, Setting aside. See RES JUDICATA 253

Sale of Tenure. See ESTOPPEL 239

——————— See RENT SUIT 116

Secondary Evidence. See PLAINT, FORM OF 509

Security to keep the Peace—*Section 491, Code of Criminal Procedure—Evidence to be recorded.*] A Magistrate is not competent to require persons to give security to keep the peace until he has adjudicated, on evidence taken in their presence, that they have by their conduct rendered this necessary. RAJAH RUN BAHADOOR SINGH vs. RANEE TILESSUREE KOOER, 22 W. R., Crim., 79, cited and followed. UMDA KHANUM, IN THE MATTER OF 72

2 ———————*Section 491, Code of Criminal Procedure—Probable resistance to lawful Collection of Rent.*] The petitioner, a *tehsildar*, applied to the Police for assistance to protect him while distraining the crops of certain ryots for arrears of rent. On this being reported to the Magistrate, he required the petitioner to furnish security to keep the peace, on the ground that any riot which might result from the resistance of the ryots to the attachment of their crops would be attributable to his act. This order was set aside by the High Court as illegal, because the Magistrate had not found that the petitioner himself was likely to commit a breach of the peace. SHEO SURN LALL, IN THE MATTER OF 280

——————— See RECOGNIZANCE, FORFEITURE OF 406

Servant in charge of House. See CONTRACT ACT, SECTION 178 398

Service of Notice.—*Enhancement—Notice of Enhancement—Joint Family.*] Of three brothers forming a joint Hindu family two only lived in the joint family dwelling house, the third residing in another district. The landlord of a jote held jointly by the three brothers sued for rent at an enhanced rate. The notice of enhancement was served only on the two who lived in the joint family dwelling house. *Held*, that the service was sufficient. NOBODEEP CHUNDER SHAHA v. SHONARAM DASS ... 359

Service upon Joint Brothers. See NOTICE 432

Sessions Cases. See INTERPRETATION ... 263

Setting aside Sale. See LIMITATION ... 4

——————— See MESNE PROFITS 28

Settlement out of Court. See DAMAGES 414

Share of Rent, Suit for—*Arrears of Rent, Suit for share of—Payment of Rent jointly—Joint lease.*] A tenant who has taken a lease from joint-owners, to whom he has paid the rent jointly, may be sued by one of his co-lessors for the latter's share of arrears of rent, the other co-lessors being made defendants. DOORGA CHURN SURMAH vs. JAMPA DOSSEE, 21 W. R., 46; and TARA CHUNDER BANERJEE vs. AMEER MUNDUL, 22 W. R., 394; cited and followed. JADU DASS MOHUNT vs. A. B. SUTHERLAND 223

Shipping Order. See CONDITION PRECEDENT 297

Slander—*Special Damage—Words actionable per se.*] While C was giving his evidence in open Court, in a suit of A against B, A, with the object of inducing the Judge to disbelieve C's testimony, said to the witness that he was a

Slander—*continued.*
drunkard. *Held*, that the words were actionable without proof of special damage. SRIKANT ROY vs. SATCORI SHAHA 181

Small Cause Court. See EXECUTION OF DECREE 30
——— See JURISDICTION 8

Small Cause Courts. See SPECIAL APPEAL 177

Small Cause Court's Act (Mofussil), section 21—*Ex-parte Decree—Non-appearance of Defendant—Re-hearing—Act X of* 1877, *sections* 98 *and* 100.] Where the defendant, in a suit brought in a Court of Small Causes, had entered an appearance, but did not appear at the hearing, the suit was decreed *ex-parte*. Thereupon, the defendant applied to the Court to set aside the judgment, showing reasons for his absence. *Held*, that under the first part of section 21 of the Mofussil Small Cause Court Act, XI of 1865, the Judge had jurisdiction to entertain the application, and upon sufficient cause for non-appearance being shewn, to grant a re-hearing. ADMINISTRATOR-GENERAL OF BENGAL vs. LALA DYARAM DOSS, 6 B. L. R., 688, cited. DOYAL MISTREE vs. KUPOOR CHAND 428

Small Cause Court, (Mofussil) Act (XI of 1865,) section 23—*Execution of Decree—Transfer of Decree to another Court.*] Under section 20 of Act XI of 1865, a Court of Small Causes may transfer a decree for execution to another Court, not only when there has been a sale of such moveables of the debtor as the judgment-creditor has been able to discover, and the proceeds of such sale have not been sufficient to satisfy the decree, but also when no sale has taken place at all, and the decree remains unsatisfied by reason of there being no moveable property of the judgment-debtor which can be found within the jurisdiction capable of being sold. CHANDRA KANTA BISWAS, IN THE MATTER OF 558

Special Appeal—*Small Cause Courts—Damages—Regulation VIII of* 1819—*Sale of Putnee Talook—Putnee Talook.*] Plaintiff is the holder of a putnee talook in the defendant's zemindary. The defendant, for the purpose of recovering rents which the plaintiff alleged he had paid, took proceedings under Regulation VIII of 1819, to bring the putnee to sale. Plaintiff, in order to save the talook, paid the amount—Rs. 68—into the Collectorate, and then brought a suit to recover back the money so paid, with interest. The suit was dismissed in the Court of First Instance, but this decree was reversed on appeal, and the defendant appealed specially to the High Court. *Held*, that the suit was one cognizable by a Court of Small Causes, and that no special appeal lay. KRISHNA KISHORE SHAHA vs. BIRESHUR MOZUMDAR 177
——— See LIMITATION... ... 440

Special Damage. See SLANDER 181

Specific Share, Right to. See JOINT FAMILY... 534

Splitting offences. See SUMMARY JURISDICTION 44

Stamp Act XVIII of 1869, Sch. II, section 5—*Entry in Hathchitta—Acknowledgment of Debt.*] Although the intention of the parties in requiring the signature or seal of the borrower to the entries in the *hathchitta* of each sum borrowed is to secure an acknowledgment that the sums have been advanced, such entries, where they are not detached from the account of which they form part, are not such notes or memoranda written in a book as required to be stamped under Sch. II, section 5 of the Stamp Act, XVIII of 1869 (Cf. Act I of 1879, Sch. I, No. 1.) BROJENDER COOMAR ROY CHOWDHRY vs. SREEMUTTY BROMMOMOYEE CHOWDHRAIN 520

Stamp Act, *XVIII of* 1869, *section* 15 *and Sch.* II *Art.* 7.—*Receipt or discharge.*] A memorandum purporting that a sum of money has been received by a Bank from a person, other than a constituent of such Bank, to be credited to a constituent's account, and furnished by the Bank for transmission to such constituent, is not a receipt or discharge given for or upon payment of money in satisfaction of a debt within the meaning of Art. 7 of Act XVIII of 1869, Sch. II, and is not chargeable with stamp duty. In the matter of THE UNCOVENANTED SERVICE BANK, LIMITED 597

Stridhan. See HINDU LAW 465

Subsequent Suit. See ACCOUNT, SUIT FOR 444

Substitution. See INJUNCTION 421

Suit, Leave to bring fresh. See RES JUDICATA 447

Suit brought under Act VIII of 1859. See APPEAL 528

Suit for Enhancement under Act VIII of 1859. See ENHANCEMENT ... 553

Summary Jurisdiction—*Splitting Offences—Offences triable summarily—Void Proceedings—Code of Criminal Procedure, section* 34.] A Magistrate should not split up an offence for the purpose of giving himself summary jurisdiction. If he does so, and the offence is not triable summarily, the proceedings are void under section 34 of the Code of Criminal Procedure. IN THE MATTER OF ABDUL KADIR ... ...

Summary Procedure against Surety. See ACT VIII OF 1859, SECTION 204 ...

Surety, Summary Procedure against. See ACT VIII OF 1859, SECTION 204 ...

Summons to witnesses, Issuing of—*Time of issuing Summons—Act VIII of* 1859, *sec.* 149—*Act X of* 1877, *sec.* 150.] The 20th of March 1877 having been fixed for the final hearing of a suit, the plaintiff, on the 17th of March, and the defendant on the 19th, filed their list of witnesses to be summoned. Both lists were merely ordered to be put up with the record. When the suit came on for hearing it was dismissed on the ground that, when the plaintiff filed his list there was not sufficient time left to summon the witnesses. *Held* that the Judge was not justified in dismissing the suit on this ground, unless he found that it would have been absolutely impossible to secure the attendance of the witnesses had the summonses been granted on the 17th instant. Section 149 of Act VIII of 1859, and section 159 of Act X of 1877, discussed. RAJENDRO NARAIN NEOGI vs. RAJAH KUMUD NARAIN BHUP 569

Talub. See PRE-EMPTION 166

Tender. See JURISDICTION 375

Term of Years. See IJARA 140

Theft. See INDIAN PENAL CODE, SECTION 108 525

Tipperah, Rajah of. See JURISDICTION 417

Time of issuing Summons. See SUMMONS TO WITNESSES 569

Title—*Adverse Possession—Limitation.*] Where a plaintiff claims to be the owner of certain land, by virtue of a particular title, coupled with possession, adverse to the defendant for twelve years, he is entitled to succeed upon proof of such possession, although he fails to prove the particular title. RAM DHUN CHUCKERBUTTY vs. SREEMUTTY KOMUL TARA, 11 W. R., 301, commented upon. CHOWDHRY GOLUCK CHUNDER MASUNTA vs. NUNDO COOMAR ROY ... 450

Title. See RES JUDICATA 447

——— See GIFT BY HINDU WIDOW ... 384

Title Deeds. See JURISDICTION... ... 375

Transferable tenure. See EXECUTION OF DECREE 146

Transfer of decree to another Court. See SMALL CAUSE COURT (MOFUSSIL,) ACT (XI OF 1869) SECTION 20 558

Transfer of decree for Execution. See EXECUTION OF DECREE... 30

Transfer of Names. See ESTOPPEL ... 239

Trespass. See PLAINT, FORM OF 509

——— **Unsuccessful Suit for, followed by Suit to establish Title to Lands.** See RES JUDICATA ... 549

Trover. See CONTRACT ACT, SECTION 178 398

Unlawful Assembly. See COMMON OBJECT 49

Unnatural Death. See JUDICIAL PROCEEDING 59

Under-Tenure. See ESTOPPEL 239

——— **Sale of**—*Sale in Execution of Decree—Arrears of Rent—Enhancement.*] A sale in execution of a decree for arrears of rent (at an enhanced rate) of a subordinate talook, which has been obtained against a party who is in possession of the talook by permission of the owners, but who has no other right or title to it, will not bind those owners, even though their names be not recorded as tenants in the books of the zemindar. SHAMOSAND KUNDU vs. BROJONATH PAL CHOWDHRY, 12 B. L. R., 484, distinguished. REDOY KISSEN DUTT vs. RAM COOMAR SEN 231

Vakalutnamah—*Power to receive Documents—Power-of-Attorney—General and Special power—Court Fees' Act—Act XVIII of* 1869, *Sch.* 2.] If a pleader is authorised by the *vakalutnamah* under which he acts to receive moneys or documents for his client in the course of the cause which he is empowered to conduct, or as a consequence of the decree or any order of the Court in such cause, a Court of Justice might legally and with propriety direct a public officer to pay money or make over valuable documents to the pleader, provided that such money or documents have become receivable by the client in the ordinary course of the suit, or in consequence of the order or decree. A general or special power-of-attorney to enable the pleader to receive such money or documents is not necessary In the matter of *Act XVIII of* 1869 13

Void Bequest—*Hindu Law—Devise to a class—Adverse Possession—Limitation—Act IX of* 1871, *Sch. II, cls.* 122 *and* 145.] A devise to a class, some of whom are unborn at the death of the testator, is invalid in Hindu law. By his will, after giving several legacies, A devised the rest and residue of his estate "to the son lately born to B, and to the son or sons that may hereafter be born to him." *Held*, that the devise was invalid under the Hindu law. LEAKE vs. ROBINSON, 2 Mer., 363; and SOUDAMONEY DOSSEE vs. JOGESH CHUNDER DUTT, I. L. R., 2 Cal., 262; TAGORE vs. TAGORE, 9 B. L. R., 377, cited and followed. Where a residuary bequest is made by a Hindu testator to his executors in trust for certain purposes which fail as being void, the person entitled to the property on failure, *i.e.*, the heir-at-law of the testator, may be barred by limitation as regards the moveable property by cl 122, sch. II, Act IX of 1871, and by cl. 145, Sch. II, Act IX of 1871, as regards the immoveable property. A trustee for a specific purpose, within the meaning of section 10, Act

Void Bequest—*continued.*
IX of 1871, is not the same as an express trustee in the English law. KHERODEMONEY DOSSEE vs. DOORGAMONEY DOSSEE 315

Void Proceedings. See SUMMARY JURISDICTION 44

Void Sale See RES JUDICATA 253

Wasilat. See MESNE PROFITS 28

Widow. See GIFT BY HINDU WIDOW ... 384

Widow, Hindu. See RES JUDICATA ... 265

Wife's Possession. See ACTUAL POSSESSION 94

Wife, Separation against wish of. See DIVORCE 484

Wild Animals—*Animals Feræ Naturæ—Ownership—Animus Revertendi—Re-capture.*] A tame female elephant escaped from her master's field in company with a herd of wild elephants and resumed her natural wild habits. The owner, plaintiff, abandoned his search after two months, and then offered a reward of Rs. 200 to any per-

Wild Animals—*continued*
son who should re-capture her. At the end of four months, she was re-captured by the defendant, who was compelled to tame her in the same way as if she had been an ordinary wild elephant. Plaintiff offered the reward of Rs. 200 to the defendant and demanded the elephant, but the demand was refused. *Held*, that under the circumstances the plaintiff had lost all claim to the animal. ARTHUR J. PEAL vs. SCOTT CAMPBELL 515

Withdrawal of Suit, Effect of. See LANDLORD AND TENANT 119

Witness, Examination of. See INTERPRETATION 263

Words Actionable per se. See SLANDER 181

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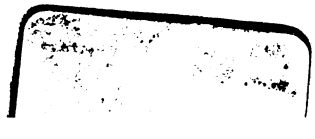
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